IN THE SUPREME COURT

OF THE UNITED STATES.

OCTOBER TERM, 1902.

THE CONNECTICUT MUTUAL LIFE INSURANCE COMPANY,
Petitioner and Plaintiff in Error.

vs.

SALLIE E. HILLMON,
Respondent and Defendant in Error.

No. 94.

BRIEF FOR DEFENDANT IN ERROR.

STATEMENT.

The record in this case shows that in 1880 defendant in error commenced her action in the Circuit Court of the United States for the District of Kansas, against plaintiff in error, Case No. 3149 on the docket of that Court, and for her cause of action in her petition alleged that on the 4th of March, 1879, plaintiff in error by its policy insured the life of John W. Hillmon, then her husband, to the amount of $5,000 in her favor, and that he died on the 17th day of March, 1879; and made such further allegations in that petition as are usual in actions on life policies (record 3-5).

The substance of the last amended answer of plaintiff in error to that petition is:

1st. A general denial of all the allegations therein.

2nd. That said John W. Hillmon was still alive and not dead, and that said John W. Hillmon, Levi Baldwin and John H. Brown, conspiring with intent to cheat and defraud plaintiff in error, and for the purpose of securing payment of certain policies, including the policy sued on, did in the lifetime of said Hillmon, falsely and fraudulently pretend and represent unto plaintiff in error that a certain dead body was the dead body of said Hillmon, and that said Hillmon had been and still was keeping himself concealed under assumed names.

3rd. That defendant in error had by a certain parol, that is, unsealed written instrument, released it from liability on the policy sued on (record 17–19).

The substance of the reply of defendant in error to that answer is:

1st. A general denial of all the allegations therein.

2nd. That said so-called release was without consideration and therefore inoperative and void.

3rd. That on or about the 17th of March, 1879, said John W. Hillmon died from a gunshot wound produced by the accidental discharge of a gun in the hands of John H. Brown, and that on the 15th of September, 1879, plaintiff in error by its agents and others by its procurement induced defendant in error, when sick, to sign and deliver said so-called release, without consideration, and by making certain false representations to obtain the same, and by fraudulently procuring John H. Brown to make the written statement set forth at record 1284–6, and mentioned in refused instruction No. 44, referred to in assignment of error No. 105 (record 2006)—all as more specifically alleged as shown at record 20–22, which reply is referred to for a description thereof.

After a verdict and judgment in favor of defendant in error had been reversed by this Court, as shown in the cases of Ins. Cos. vs. Hillmon, 145 U. S. 285, and also after some mis-

trials, the case was on the 13th of June, 1899, at the June term, by consent of the parties, set to be called for trial on the 16th of October, 1899 (record 67), and on that 16th of October, 1899, the case came on for trial on the issues made by said petition, answer and reply, and the trial thereof, with another case, to-wit: that of said defendant in error against the Mutual Life Insurance Company of New York, Case No. 3147, with which it had been consolidated for trial (record 65–6, 69), was proceeded with, and resulted in a verdict and judgment in her favor for the sum of $11,034.00 and costs, on the 18th of November, 1899, at said June term (record 117–18, 1928–9), and afterwards on the 20th of November, 1899, that Court extended the time of plaintiff in error for making, signing, settling and allowing a bill of exceptions in *that first mentioned action*, that is, in the case of defendant in error against plaintiff in error, Case No. 3149, to and including the 2nd of April, 1900 (record 120–1).

If we correctly understand the meaning and effect of the order of this Court of December 2d, 1901, the question as to what shall be considered and treated herein as the record to be considered and acted on by this Court is left open for consideration of all such proper objections as we may urge thereto; and hereinafter in the argument part of this brief, we urge certain objections, some of which are supported by affidavits filed herein on the 18th day of November, 1901, as reasons why the 1,798 pages, part of the printed volume filed herein, consisting of 2,033 printed pages, called the record in this case, which is between side paging or figures 221, on page 129, and the side paging or figures 206, on page 1927 thereof, should not be referred to, treated or considered as any part of the record herein, and without waiving our objections in that respect, we proceed with our statement of the case, and for such purpose as well as for the purpose of argument of the matter of the several assignments of error in the record, we refer to said volume as though said objected to part was a part of the record, without waiving our objections thereto.

On the 3d of April, A. D. 1901, the Circuit Court of Appeals affirmed the aforesaid judgment ot said trial Court as

shown at record 2030, and as that Court of Appeals acted in the premises without more of the record or proceedings in said case No. 3149, in which plaintiff in error was party in said trial Court, being before it, than was therein, at the instance and request and on motion of plaintiff in error, it follows as is hereinafter argued that plaintiff in error cannot now be heard to complain that the Court of Appeals proceeded and did what it did in the matter without having before it more than it did have of the record and proceedings of the trial Court in said case No. 3149, in which the judgment complained of was rendered.

And for reasons hereinafter urged in the argument part of this brief, we contend this Court has not jurisdiction to review the record or consider whether either Court erred in rendering such judgment as they respectively did.

The record—if the whole printed volume over our objection shall be treated as such—shows that as to some matters there was conflicting evidence, but as to the questions raised by the issues, there was when the introduction of evidence closed only one question left in controversy, and that was the question as to whether the dead body herein mentioned was the corpse of John W. Hillmon or not, which narrowing down of the issues came about in this way: Citizenship of the parties as alleged was duly and fully proven as shown at record 145–6, 744 to 750, 836, 839 to 847, and plaintiff in error, and the defendant in the other case being tried with it, admitted that defendant in error had made due proofs of death, as shown at record 201, and because of the nature of the defense, even if such admission had not been made, it would not have been necessary to prove giving of notice or proof of death. By uncontradicted evidence it was proven that the premium on the policy sued on had been duly paid for a period beyond the time of the death of Hillmon, as shown at record 145, 151–2–3, 752, 1496, 1524, and by uncontradicted evidence it was proven clearly and beyond question that there was not to be any consideration given for that release (r. 580–1, 592, 1241, 1243), and that it was made without consideration (r. 773, 830, 831, 1241, 1243), and fur-

ther the evidence showing the circumstances under which it was made and obtained, particularly the testimony of

Reuben Brown, record 544 to 575.

James W. Green, record 575 to 597 and 1900 to 1904.

(Munn paper, 580, 581.)

John H. Brown's deposition, record 341 to 465, so much thereof as was read.

Sallie E. Smith, formerly Sallie E. Hillmon, defendant in error, record 766 to 779, and 812 to 825, 830, 831, and 1897 to 1900.

William J. Buchan (r. 1241, 1243) proved an entire want of consideration for that release.

And thus the only issue made by the pleadings left in actual controversy when the evidence closed was as to whether said dead body was that of John W. Hillmon or not, and that plaintiff in error so considered the evidence and situation to be after all the evidence had been given, is shown by the fact that it requested the Court to instruct the jury as shown by instruction No. 1 (r. 1904, 1996), among other things that "in this case the question to be determined is whether the body brought to Lawrence in April, 1879, was the body of John W. Hillmon," and also requested the Court to instruct the jury as shown at record 1909, 2003, as follows:

"No. 28. The lapse of time since the alleged death of John W. Hillmon is an immaterial matter in this case, for the reason that the real question in this case is whether or not John W. Hillmon died at the time and in the manner in said petition alleged, that is, from a gunshot wound at the hands of one John H. Brown, at Barber County, on the 17th day of March, 1879."

But it not being proper for the Court to give to the jury all of said instruction No. 1, as is hereinafter shown by our argument in relation to the matter of the 85th assignment of error, nor to give all of said instruction No. 28, as shown by our argument hereinafter made in relation to assignment of error No. 99, the Court did not give all of either of those instructions, but did in substance adopt a part of each of those instructions, that is, the parts thereof respectively which were

to the effect that the *real* question in the case to be determined was whether said dead body was the corpse of Hillmon or not, by instructing the jury as shown at record 1917, 1919 and 1921, and of course after asking the Court to so instruct the jury, plaintiff in error cannot be heard to complain of the Court having so instructed the jury; and by requesting the Court to so instruct the jury, we see that plaintiff in error itself asked the Court to instruct the jury to the effect that if from the preponderance of the evidence the jury believed said dead body was that of Hillmon, they should find for defendant in error, and by so doing plaintiff in error eliminated many questions it now makes from the case, including all the questions it now makes in relation to any supposed conspiracy. And we see that by so doing plaintiff in error conceded that our claim in relation to the meaning and proper interpretation of its second defense is correct, that is, that by that second ground of defense it merely pleaded that Hillmon was alive, and not dead—a sort of affirmative denial of the allegation in the petition that Hillmon died on March 17, 1879.

THE EVIDENCE.

The only material question for consideration in connection with the evidence being whether a certain man accidentally killed by the discharge of a gun in the hands of John H. Brown, near Crooked Creek, on the evening of the 17th of March, 1879, was or was not John W. Hillmon, we now proceed to refer to the evidence bearing on that point.

Said Brown testified he so accidentally killed John W. Hillmon. (R. 344, 345, 404, 405, 411, 412, 413, 415.) His dead body was seen where killed by divers persons soon after he was killed, collected together because of Brown giving notice of the killing (r. 319 to 332, 346, 602 to 605 to 607), one of whom had seen the parties there the evening before. (R. 346, 408.)

An inquest was held there on the next day after the killing. (R. 323, 328, 346.)

EVIDENCE IDENTIFYING THE CORPSE AS THAT OF JOHN W. HILLMON.

The dead body was then taken in a wagon to Medicine Lodge, where, on the day following, another inquest was held. (R. 324, 346.)

And several persons who had seen Brown and Hillmon together in Medicine Lodge, recognized the body as that of Hillmon, among whom were Harvey M. Davis, John W. Upperman, Clark Gilmore, Derrick Updegraff, Eli Smith, E. M. Byerly, W. W. Standiford and F. P. McAllister, at pages hereinafter referred to.

Hillmon was then buried in the Medicine Lodge burying ground. (R. 334, 346.)

Defendant in error having heard of the death, sent relatives of hers, Levi Baldwin and Alva Baldwin, to bring the body to Lawrence, Kansas (r. 753, 792, 720, 721, 687, 705), who recognized the body as that of John W. Hillmon (r. 723, 689).

Representatives of the insurance companies, including Theodore Wiseman, Robert Walker and C. E. Tillinghast, agents of the insurance companies (r. 866–7, 884–5–6–7), also went to Medicine Lodge, and were present with John H. Brown, Levi Baldwin, Alva Baldwin, and others, when the body was exhumed at the Medicine Lodge burying ground. (R. 346, 347, 883–4–5–6–7.)

Alva Baldwin and John H. Brown transported the body in a wagon, about eighty or more miles, from Medicine Lodge to Hutchinson, a point on the A., T. & S. F. Ry., from whence it went by railroad to Lawrence, Kansas, where it arrived on the morning of the 3d of April, 1879 (r. 756, 757), it being then seventeen days dead (r. 723, 735, 742, 743, 689, 690, 347), and it was buried two days later, and on the 6th of April again exhumed, and the photos taken (r. 1542) of the twenty-day corpse, after the hair had been mussed, disarranged and become mixed with dust, the eyes sunken, lips shriveled, and decomposition had proceeded so rapidly, as shown by the photos of the corpse and testimony at record 241, 225, as to be nearly, if not quite, unrecognizable by any person who had not recently seen the corpse.

The corpse, on its arrival at Lawrence, passed into the possession of Bailey & Smith, undertakers at Lawrence. (R. 690, 525.)

Mrs. Hillmon expected it to be brought to the place where she resided by Bailey & Smith, but they took it to their undertaking establishment. (R. 756, 757, 758, 765, 525.)

VACCINE SORES.

When the body was exhumed, the first thing done by the representatives of the insurance companies was to cut open the sleeve on the arm of the corpse for the purpose of ascertaining whether it bore the vaccination mark which the agent of the company knew should appear upon the arm of John W. Hillmon; and the sleeve was cut open upon the arm known by the insurance companies to have been inoculated, and at the point on the arm where it was known to them the vaccine virus had been inserted; and when the sleeve was so cut the scab was found at precisely the point where the cutting was directed to be done, and where Dr. Stuart, the medical officer of the company, had inserted the vaccine matter. (R. 723–921.)

In the forenoon of the day of its arrival at Lawrence, defendant in error, with companions—her mother and others—went to that place (Bailey & Smith's) to see the body, but were refused and prevented from seeing it then on excuse to the effect that it was not then in condition to see. (R. 758, 796, 534, 535, 1542, 1540.)

This was the very time (r. 1540)—on April 3, 1879—when J. H. Stuart, M. D., and V. G. Miller, M. D., examining physicians of the insurance companies, and other M. D.'s were cutting out certain vaccine sores from the arm of the corpse at same place (r. 921), where said Stuart, medical examiner for plaintiff in error, had, on 20th February, 1879, vaccinated John W. Hillmon (r. 921). See evidence bearing on vaccine sores on arm of corpse, record 723, 688, 641, 507; also testimony of Dr. J. H. Stuart, record 919, 920, 922, 968 (in forenoon of first day Stuart, 968), 969, 970, 982, and that of Dr. A. Fuller, 672.

There was contention at the trial as to whether those

sores were the result of the vaccination of Dr. Stuart or of a more recent vaccination; but the fact that said learned M. D.'s, Stuart and Miller, applied a hot iron to the piece of flesh so removed for the purposes by them stated at record 969, 970, 971, considered in connection with the testimony of several other disinterested physicians, shown at record 1812 to 1847, clearly shows that as to the age of those vaccine sores on the corpse, no one could tell with any reasonable degree of certainty. The evidence altogether leaves it doubtful as to whether a first scab had been removed by accident or not, or whether a natural scab had dropped off. And more than that, the action of Stuart and Miller in burning the piece of flesh, raises a question of their good faith and intelligence.

It would seem that the doctors for the Insurance Companies were in doubt as to whether the marks upon the arm could not have been produced upon the body after it was dead by means of applying a hot iron, and were in doubt as to whether the marks were indeed vaccination marks or not; all of which is grossly inconsistent with the testimony of these same physicians, who testify dogmatically upon the trial that the marks were vaccination sores, and that they could determine the age of the same with certainty.

And the purpose, in part, of removing the vaccine sores being to apply a hot iron thereto to see the effect thereof, etc., goes far to show that the testimony of Drs. Stuart and Miller with reference thereto, could not reasonably be expected to weigh much so far as the same conflicted with the testimony of the other physicians and medical experts, referred to at said record 1812 to 1847, with reference to the age of vaccine sores, etc., by which it is shown that it could not, with any reasonable certainty, be told by the description given by Miller and Stuart of the vaccine sores or scabs, how long before death the vaccination had been done.

See as to such use of the hot iron, record 969, 970, 971, 988.

In this connection we refer to the excuse of Stuart for removing the vaccine scab, that he did so to preserve it (r. 922, 923); and the fact that he, early in 1882, threw it away,

before the first trial of the case (r. 923, 984, 987, 988), as bearing upon his good faith and apparent desire to get rid of evidence.

HAIR.

Some of the hair was taken from the corpse by Dr. J. H. Stuart to preserve a specimen, so as to be able to show, as he claimed, its character and color (r. 929, 987), *but none of it was produced at the trial.*

That the autopsy—removing of the vaccine sores and exhuming and examination of the corpse were all *without notice to or knowledge of defendant in error.* See record 969, 982. 738 766.

IDENTIFICATION OF CORPSE AS HILLMON'S.

Many persons who saw that dead body at Lawrence, had known John W. Hillmon in his lifetime, and recognized and identified it to be him, his corpse, as shown at the following pages of the record:

A. E. Wellman, 219.

Joseph Rahskopf (Rahskopf in cemetery), 226.

Ed. Canovan, 251.

Phillip Olmsted, 255.

John Osborne, 259.

H. Covey, 265, 266, 295. (Mole, 266, 281.)

John Eldredge, 302, 303–5, 312, 313.

J. W. Fugate, 521.

Arthur Judson, 525, 530.

Sallie E. Smith (defendant in error), 756, 758.

Levi Baldwin, 686 to 690. (See as to Alva Baldwin, r. 723), and John H. Brown, his deposition, record, 345, 346.

These last three and the following persons, also at Medicine Lodge, recognized the corpse as that of John W. Hillmon, namely:

Harvey M. Davis, 611, 612, 613.

John W. Upperman, 625, 627, 628, 631, 632, 633, 636.

Clark Gilmore, 640, 641 (vaccine scab, 641), 642.

Derrick Updegraff (hotel keeper at Medicine Lodge where Hillmon and Brown took meals in January, 1879) 663 to 665.

E. M. Byerly, 656, 657, 660.
Eli Smith, 661, 662, 663.
W. W. Standiford, 675, 676, 677, 678.
F. P. McAllister, 683.

That John W. Hillmon and John H. Brown were traveling to find a stock ranch suitable with range and water, without getting too close to the farmers around on the creeks, is shown by evidence, record 349, Q. and A. 80. (See also record 334 Q. and A. 33). Hillmon went to Lawrence twice during this time they were traveling, 344.

When they left Wichita, Kansas, on their last trip those two went alone in a wagon.

John H. Brown, record 393 and 344 (Q. 39) 443.
Julius Draves, record 1412, 1413, QQ. 62, 64, 68, 69 and 70.
Michael Mesh, record 1562.
Ben Helda, record 1574.

The three last named were witnesses called by the Insurance Companies.

They were seen together at Medicine Lodge on that last trip, without any third person with them.

Derrick Updegraff, 665.
Eli Smith, 662.
Byerly, 656.

At this place Hillmon evidently got the letter from his wife mentioned at record 759, and spoken of by Brown at record 397, and by Eli Smith, the postmaster at Medicine Lodge, record 662.

And the two men were seen to be alone as they went out of Medicine Lodge in their wagon by one E. M. Byerly. (Record 655 to 661.)

And farther along on the road going towards where Hillmon was killed, the two men were seen still to be alone by Nathan S. Priest. (R. 673.)

After the body arrived at Lawrence, another inquest was held, really at the instance of representatives of the insurance companies, at which Messrs. George J. Barker and James W. Green, attorneys for the insurance companies in the trial

Court, acted in behalf of the State, Mr. Green being county attorney of the county where this Lawrence inquest was held. (R. 894–5.)

There is much conflict in the evidence in said bill of exception as to whether that dead body was or was not that of John W. Hillmon. Plaintiff in error anong other things at the trial, as shown by evidence it introduced, claimed it was that of one Frederick Adolph Walters, of Fort Madison, Iowa, and it also further claimed that Brown and John W. Hillmon had enticed Walters to go along with them from Wichita by way of Medicine Lodge to Crooked Creek, in Barbour County, Kansas, and there shot him, notwithstanding the fact that only the two men, Brown and Hillmon, were ever seen on the route as above shown. Different men occasionally being with them, as would of course be the case on such a trip, as shown by the deposition of John H. Brown.

We here refer to the pictures of the corpse and the pictures of Hillmon and Walters, taken in life respectively, part of the exhibits at instance of plaintiff in error sent to this Court (as shown at r. 128, 129), and on comparison of all thereof, we claim that beyond any reasonable doubt, the corpse so photographed is by such comparison shown to be that of John W. Hillmon.

NOSE OF BOTH HILLMON AND WALTERS.

John W. Hillmon had a Roman nose. (R. 1094, 1080, 636, 621, 662, 1116, 1125.

That the nose of John W. Hillmon was injured, see testimony of Dr. N. Simmonds, record 214 to 218; Henry Hillmon, his brother, record 1094, and Mrs. Nichols, his sister, record 1116, 1125. See also testimony of Rahskopf, record 227, 233.

And that such injury was the natural cause of the breaking down, shown on side of the nose in the front view photograph of the corpse, as testified by Dr. A. Fuller, record 672.

And that picture shows the nose of the dead man to have been crooked, turned a little to one side, as Dr. A. Fuller testified, record 672.

That the nose of John W. Hillmon because of such injury *was* a little *crooked* or *turned* a *little* to *one side.* (See testimony of his brother Henry Hillmon, record 1094, and also his sister, Mrs. Nichols, record 1116, 1125. See also tintype picture, Exhibit No. 22 D, record 128).

That the nose of Frederick A. Walters had not been injured and was STRAIGHT, *not crooked sideways*, see testimony at following pages of record, of his father Daniel Walters, 1628, Q. 138; his sister Fannie Walters, 1805; Alvina D. Kasten, 1700, Q. 122; Charles W. Schott, 1677, Q. 184; Gustave Buckholz, 1708, Q. 37.

That Walter's nose was blunt, his sister, Mrs. Rieffenach, testified, record 1783.

EYEBROWS.

Dr. Stuart, at record 927, 965–966, testified to the effect that the eyebrows of the corpse came close together. The pictures of Hillmon show his did. The picture of the corpse corresponds with Stuart's testimony and the photos of Hillmon in that respect, whilst the pictures of Walters show a large, clear, open space between his eyebrows.

DOG BITE.

Physicians and surgeons, medical examiners of the insurance company and others, made an examination of the dead body carefully, with a magnifying glass, from head to foot, with a view of finding identifying marks while it was so at Baily & Smith's, and to some extent further when it was last exhumed, and testify that they failed to and could not find any marks thereon, and further said that their examination was such that the scars could not have been on body and they not have seen it. (R., A. Fuller, 671, 672.) Dr. J. H. Stuart and others carefully examined the body from sole of foot to top of head. He made full notes (r. 939, 940); they did not find anything to correspond with the dog bite or corns or bunions on Walters, nor a crooked finger, although they examined so carefully as to find a little mole, not larger than a mustard seed (r. 938 to 941, 944, 945); if Stuart had found any such marks he would have noted same. (R. 944.)

But it is shown by the evidence of witnesses for the insurance company that Frederick A. Walters had the scar of a dog bite on one of his legs (calves). See the following pages: His father, Daniel Walters, 1624, Q. 70 to 80; his brother, Charles A. Walters, record 1770, 1743, 1755 (see also 1757); as to his sister, Fannie Walters, see 1802 to 1805, and 1810, 1811 and 1812; his sister, Mrs. Reiffenach, 1776, 1782.

WALTER'S CROOKED LITTLE FINGER—NONE ON CORPSE.

That one of the little fingers of said F. A. Walters was crooked, record 1716.

That the said dead body did not have any such crooked little finger, record, 945; nor did Hillmon, record 720.

WALTER'S BUNION.

That there was a bunion on one foot at joint of big toe of said Walters, which made one foot noticeably larger than the other, his brother, Charles A. Walters, record 1744, 1755, 1757; Lesch, record 1684.

That there was not any such bunion on the corpse, Dr. J. H. Stuart, 929, and other witnesses.

WALTER'S CORNS.

Corns on Walters' feet, record 1744 and 1652; none shown on corpse, record 938, 939, 940.

HILLMON RING MARK.

Ring mark on corpse on little finger, Rahskopf, record 227, 231, 232, 233; Patterson, 242 and 243, 247, 248, 249, 250.

That the corpse of John W. Hillmon would naturally have showed such ring mark, see record 779, 791, as he sometimes wore one, which was lost at trial of 1895, record 779.

HANDS—DRIVING MARKS ON.

Hands of corpse showed evidence of handling driving reins, 230; Hillmon's might show such rein marks, as he was sometimes driving a team, while Walters' would not, as he was a cigarmaker.

TEETH.

The teeth of the corpse appeared good except one worn or broken. (See testimony of the dentist who examined for insurance companies [r. 237], which is probably the same tooth spoken of by Henry Hillmon, his brother, at record 1094.)

Hillmon had good teeth (r. 748, 525, 531, 532, 539, 720, 507. See also evidence hereinafter alluded to in relation to assignment of error No. 85.)

Vaccine sore on arm of corpse, 723, 688, 641, 507.

HILLMON'S DARK BROWN HAIR.

That Hillmon had dark brown hair, see his description in applications and M. D. examiner's certificates, record 192 and 195.

Other witnesses, record 532, 537, 748, 612, 652, 667, 720.

HILLMON'S HEIGHT, LENGTH OF CORPSE, ETC.

Policies of insurance, as the Court will take notice (10 Kansas, 525), are issued on applications therefor, and certificates of medical examiners (agents of the insuring company) of the description, including height, marks or former injuries to, as matters of description of the person whose life is insured.

Dr. J. H. Stuart was examiner for the New York Life Insurance Company and for plaintiff in error. (R. 910, 913, 914, 915.)

Dr. Stuart, the medical examiner of the plaintiff in error, examined John W. Hillmon upon an application for life insurance December 24, 1878, and in doing so, measured him, and inserted in certificate attached to applications for insurance the statement that his height was 5 feet 11 inches. On February 25, 1879, he again examined him—this time when applying for the very policy which is the basis of this action, and again inserted into this application the statement that John W. Hillmon was 5 feet 11 inches in height. This height corresponds to the length of the corpse. (R. 178, 179, 184, 185, 926, 940.)

And in that application, as shown at record 180, it was stated to the effect that there was $20,000.00 insurance on the life of Hillmon, and the plaintiff in error chose to increase it to $25,000.00 (see r. 1523) when it was getting premium, but on pay day claims Hillmon had too much insurance.

Hillmon's own statement, in an application for insurance, of his height, at record 187, No. 5, shows him to be five feet eleven inches.

Application appearing, record 192 and 193, signed by Dr. V. G. Miller, of the Mutual Life Insurance Company, on 5th of December, 1878, shows same height.

In the effort to show the corpse was not the dead body of Hillmon, the insurance companies and their medical examiners went back on their statements made by themselves in those certificates.

For testimony in relation to said five feet eleven inches in the applications and M. D. certificates, see record 155 to 167, and 201 to 213; Dr. J. H. Stuart, record 909 to 918, 934 to 938.

Record 935–6 shows that Stuart stood by Hillmon on the level floor, 941–2–3, 948 and 949, and the scale for measuring was near by on wall, and height was important matter of description, as Stuart understood it (941 to 961), and this was true each time Hillmon was in Stuart's office.

Different examinations, measurements, etc., of John W. Hillmon by Dr. J. H. Stuart, on 31st October, 4th and 24th December, 1878, and 24th, 25th February, 1879. (R. 943, 945 to 949 to 961, 989.)

Dr. J. H. Stuart says Selig was present first time he measured Hillmon, and that that was in the early part 1879 (r. 989), and that if he measured him afterwards it was on 25th February, 1879. (R. 989.)

And Stuart swore he did not see Hillmon or measure him after 25th February, 1879 (r. 918, 990); and never measured him but once in presence of Selig, and that that was before February 25, 1879. (R. 990.)

And further in reference to Hillmon's height being five feet eleven inches, and Dr. J. H. Stuart having himself so

written it in the certificate, at record 184, 185, in addition to above reference to testimony at pages given, we also refer to record 1496, 1500, 1501, 1506 to 1518, 1522, 1524 to 1526. In this connection see the question objected to by plaintiff in error at record 1526, and see also record 1880 and 1881; which height corresponded with the length of the corpse. (R. 926.)

And there was oral evidence of several witnesses to the same effect (r. 748, 690, 222, 215, 225, 234, 235, 251, 258, 259, 266, 306, 315, 316, 318, 521, 522, 526, 528, 529, 690, 720, 764), that he actually measured 5 feet 11½ inches. (R. 748 and 526, 528 to 530, 507.) See also record 138 (opening statement).

And we here refer to what we hereinafter say in relation to assignments of error Nos. 79 and 86 respectively, relating to the matter of the height of Hillmon, as though here set forth.

SCARS.

Attention was drawn to injuries, and answered in application and M. D. certificate papers to the effect that Hillmon had no scars. (See r. 199, No. 13; 181, No. 9; r. 188, No. 9; r. 193, No. 8; 169, No. 8; 176–7, No. 9; top of r. 944; r. 196, No. 13.) None of the insurance company agents who insured him pretended to have seen any scar on Hillmon's hand.

If any such scar, as claimed by plaintiff in error, was on Hillmon's hand when being examined by plaintiff in error by its agent, J. H. Stuart, M. D., it would naturally have been seen by him. See his evidence at record 935, 943 to 948; and Selig, record 1521.

And there was none on the hand of the corpse, as shown particularly at record 929.

And none on the hand of Hillmon. (R. 537, 720, 831, 1123, 1124.)

PHOTOS OF CORPSE—HILLMON AND WALTERS COMPARED.

Defendant in error buried the corpse at the Lawrence cemetery. It was afterwards, without her knowledge or consent, at the instance of representatives of the insurance companies, exhumed (r. 766), and (r. 241, 929) photographs were,

at instance of the insurance companies, taken of the corpse in the coffin—one a front view and the other a side view—but this was not done until after the hair had been rumpled and become dusty, and some had been pulled out, as shown at record 241–2, 225–6; copies of which two pictures are among the exhibits mentioned at record 128 and 129, forwarded for examination to this Court.

Several witnesses identified pictures (Exhibit No. 10) as that of John W. Hillmon. (R. 225, 226, 251, 255, 259, 266, 303, 304, 313, 690, 760, 761, 763).

When the body was so exhumed at the cemetery at Lawrence, and the photographs of it taken, it had of course greatly decomposed, as shown at record 241, 242, 928, 989.

Still the whole matter of pretended identification as to Walters rests on the photos taken twenty or more days after death and exposure, as shown by the evidence. (See r. 241, 742).

WALTERS SEEN ALIVE AFTER APRIL, 1879.

And in this connection we refer to testimony which is to the effect that it could not have been the corpse of Walters, because of his being alive. See deposition of Charles W. Schott taken by insurance company, in May, 1881, who in answer to question of insurance company, said he saw Walters at Kansas City, Mo., in the spring of 1879 (r. 1666, 1670 to 1673), and the testimony of Arthur Simmons (r. 1856, 1858, 1860), to the effect that Walters worked for him in May, 1879, two months after the death of Hillmon on Crooked Creek.

And Walters whilst on his tramp was in Leavenworth, Kansas, where he so worked for Arthur Simmons. See testimony of his sister Fannie Walters. (R. 1795 and 1808).

And further in this connection we refer to what we hereinafter say in relation to assignments of error Nos. 74 to 77 and 84, relating to the matter of the Walters theory, which, with an examination of the evidence, will show was by plaintiff in error, by its assistants and agents, introduced in the case as a supplemental substitute to supply the crushed Burgess

theory, but which Walters theory on examination of the materials of which plaintiff in error thus attempted to construct it, will show was not only an attempt to pass off an untruth as a truth, but also shows an effort so to do by witnesses who admitted to the effect that in their opinion falsehood was good enough to try to defeat defendant in error with.

Defendant in error, whose maiden name was Sallie E. Quinn, was a farmer's daughter, and lived as such girls usually do, and of course occasionally visited her cousin, and would naturally sometimes stay for a short time at his house; she was never a dependent of Levi Baldwin in any manner, nor is there anything to excuse claiming she was.

John W. Hillmon was an average young man, excepting more energetic than most young men. He was only at Baldwin's house when his business made it proper for him to be there. It is true he had served in the army. The occupation of Hillmon was honest, upright, and showed efforts to get on in the world by honest efforts and business. There is nothing to the contrary shown in the case—nothing to excuse any aspersion of him whatever; he worked on farms, and at herding cattle, and in the matter of gathering buffalo robes, and in mining, and in trading in live stock like other men; he is shown to have had considerable property before his death. Brown paid him some money (r. 475, 477), which he had received from Hillmon from a packing house where Brown sold hogs he had fed for Hillmon. (R. 476.) Hillmon held notes on Baldwin to considerable amount (r. 1889), on account of which Baldwin paid some money to defendant in error after death of Hillmon. (R. 1895, 1896.) It is not reasonable to suppose that all of Hillmon's money can be accounted for, he having died as he did.

Hillmon and defendant in error contemplated marriage from some time in 1873 until they were married on the 3[illegible] of October, 1878 (r. 746, 748, 782), soon after which Theodore Wiseman, who afterward figured largely in the respective Nichols-Burgess-Walters theories (r. 903, 906, 908, 877–8, 880–1, 887–8), and was the general manager of the efforts to defeat defendant in error until H. B. Munn come on the

scene of action, both as hereinafter shown, solicited John W. Hillmon to take insurance on his life (r. 305, 306), which was the beginning of the insurance negotiations.

Plaintiff in error knew Hillmon was a stock dealer, as shown in the applications for insurance (r. 167, 171, 174, 180, 186); see record 1498, where it is shown that Selig, the agent of plaintiff in error (r. 1496, 1505), because of the accident policy transactions mentioned there and elsewhere in his (Selig's) testimony, knew and had notice, and through him, its agent, plaintiff in error had notice that it got the chance of so insuring Hillmon, because the accident company was not willing for Hillmon to carry fire-arms and do fast riding after stock. (R. 1496–7–8 and 1518.) His doing so appears to not have been objected to by plaintiff in error. From the fact that negotiations about insurance commenced 31st of October, 1878, extended until February 25, 1879 (r. 170, 173, 177, 179, 181, 183, 185, 187, 191, 194, 198, 305–6), and by the testimony of Selig, Stuart and Miller, representatives of the insurance companies, it will be seen that the insurance contracts were not made in a hurry, or without due consideration on the part of the insurance companies, whose agents surely knew who and what Hillmon was, and insured him in the light of that knowledge.

We submit there is nothing in the record justifying any claim that the Insurance Companies were overreached in any manner by any person acting under any false pretences. The business was transacted in the usual and ordinary way, and his taking insurance was entirely natural, when we consider that Hillmon was going into a dangerous country, dangerous because of the then recent Indian raids in that part of Kansas, shown by the public history of this country, of which of course this court takes notice, memory in relation to which may be refreshed by referring to Chapter 112 of the Session Laws of Kansas, 1879, where is found resolutions in relation to those Indian raids. It is evident that the insurance by plaintiff in error on the life of Hillmon was taken in lieu of an accident policy (r. 1498), and as shown at record 750, 751, 752, and defendant in error offered to return to plaintiff in error its said policy, because Hillmon was going to drop it on

his return (r. 751–2) if it would give back the premium therefor, but Selig, its agent, declined to do this, (r. 750–1) because the premium had been paid and sent to the home office of the plaintiff in error, and that she would have to take the policy, and that she had better keep it because Hillmon was down in a wild country, and suggested that she did not know what might happen before he got back (r. 752). He (Selig) having that policy, gave it her (r. 752), and was agent to receive premiums, etc., as shown at record 1524 and 1496, and to deliver the policy sued on (r. 1506).

Levi Baldwin, from the evidence, appears to have been an energetic farmer, and afterwards a stock man.

And there is nothing in the record showing he did anything other or different than such a man, a cousin of defendant in error, naturally would and should have done upon receiving news of Hillmon's death; he would have been less than a man if he had done less than what he did do in behalf of defendant in error, when we consider their relationship and acquaintance; it was natural that he should sometimes be with Hillmon, and afterwards, at the request of the defendant in error, that he and his brother should go and get the corpse of Hillmon. (R. 753, 792, 721.)

John H. Brown is shown to have been nothing more or less than an ordinary man, doing what thousands of others in those days did in that section of the country to make a living. If Hillmon and his wife lived more economically than wealthy city men do, that is no cause for suspicion or calumny to a disinterested person, and was not to the insurance companies when they were getting premiums.

In relation to any remarks about notice of death of Hillmon to his wife, etc., we refer to record 756, where plaintiff in error, by its attorney, stopped defendant in error from testifying in detail upon that subject, and having done so it is not for it to complain about any lack of fullness in the evidence concerning such notices.

And as to her demeanor when being questioned as a witness at the Lawrence inquest by counsel for the insurance companies, being such as struck certain insurance witnesses

otherwise than favorably, is a matter of opinion too trifling to urge against her, considering those attorneys sought to cast derision on her testimony by trying to get her to compare a comparatively bald head with a head of full nice hair, as shown at record 1887, in a proceeding before the coroner in which the same attorney who represented the insurance companies in the suit had the control of the proceedings, except that notwithstanding all the efforts of plaintiff in error to support a claim that defendant in error was represented by an attorney, dwindled to the statement by Mr. Green to the effect that Mr. Borgalthous, to quote the language of Mr. Green at record 596, amounts only to this:

"Q. Did he ask questions of any of the witnesses?
"A. He did not; yes, he asked a question, but——
"Q. (interrupting) Of what witness?
"A. I don't remember now which witness."

Which matter relating to Borgalthous' action at the inquest is further and fully explained by reference to record 810, where it is shown that all the part he there took was to *shame* those attorneys of the insurance companies whilst engaged in their *investigations*, soon hereinafter mentioned, for trying to force defendant in error to identify a trunk, which she could not, as shown at record 810, have reasonably been expected to recognize or in any manner identify.

And defendant in error, after the commencement of her suit, in which she recovered judgment as above mentioned, married one James C. Smith, which explains why her name appears sometimes as Sallie E. Smith in the record and index thereto (r. 151).

The before and hereinafter mentioned Theodore Wiseman commenced the matter of insurance on the life of Hillmon by soliciting him to insure his life at the office of John Eldridge, in North Lawrence (r. 304, 305–6), where some papers connected with insurance, a friend's statement, was signed, dated of the 31st of October, 1878 (r. 305–6), the date of the first made medical examiner's certificate shown in the record (r. 198), at which time Hillmon was measured at that office as being five feet eleven inches (r. 306).

Theodore Wiseman, in the employ of one or more of the insurance companies from before the dead body had been brought to Lawrence (r. 884–5–6–7), on his way back from Medicine Lodge to Lawrence, whilst at Hutchinson wired a telegram (r. 901–2) to G. W. E. Griffith, an agent at Lawrence of one of the insurance companies (r. 1478), directing Griffith to see the defendant in error *immediately* and get from her a description of her husband (r. 1492), and in pursuance thereof Griffith on the 1st of April requested her to call at his office (r. 1482), and procured the attendance of A. L. Selig, agent of the other insurance companies interested (r. 1496), to attend the anticipated interview, and when she called at his office they proceeded to try to get from her a false description of Hillmon (r. 1885–6–7), and dispute arising between them she left (r. 1885–6–7 and 1892–3) without having signed whatever Griffith wrote on the subject (r. 1893), although Griffith wrote something there then, but it was not produced at the trial, *which of course it would have been if they had not failed* in the scheme to entrap her into failing to give a correct description of Hillmon.

On the arrival of the dead body (r. 1540) that very day, in the morning, such proceedings in relation to cutting up the body, including removal of the vaccine scab or sore from the arm of the corpse, occurred as above mentioned, and the body to a considerable extent cut to pieces, as though that would help in the matter of identification, instead of being an obstacle.

Mr. James W. Green, one of the attorneys for plaintiff in error, was, when that dead body was brought to Lawrence, County Attorney of Douglas County, Kansas, in which county Lawrence is situated (r. 576, 588), and was by plaintiff in error employed as an attorney in the matter somewhere from the 12th to 15th of April 1879 (r. 589, 576–7) and Mr. George J. Barker, who signed the aforesaid answer (r. 19), was employed as an attorney in the matter for one or more of the insurance companies by Wiseman before the Lawrence inquest (r. 892–3, 895), as was also Mr. Green, and was further so employed about that time by the third insurance company (r. 576).

And those two were the only attorneys authorized to appear at the Lawrence inquest for any person. Defendant in error was not there represented by any attorney (r. 764–5, 810 and 596), and they, Mr. Barker and Green, appeared at that inquest and examined witnesses (r. 575, 495) (after two previous inquests held in the county where the accident occurred), the object of which inquest held at Lawrence being, as shown by the testimony of Mr. Green in answer to questions asked him by Mr. Barker (r. 589) *to investigate the question as to whether the dead body* was the corpse of Hillmon (and not as to whether a crime had been committed or not, be that body whose it might), thus using public machinery contrary to the spirit of the law, for the private use and purposes of plaintiff in error and its cointerested insurance companies.

That *such was* the object of that Lawrence inquest, and so understood by both Mr. Barker and Mr. Green, is quite clearly shown by Mr. Green answering: "It was to *still further investigate the question* as to *whether* that was the body of John W. Hillmon or not," to the question of Mr. Barker as to what was the nature or character of his employment, his *first duties*, and as to what was the first thing required of him (r. 589 and see r. 577) as such duties would not have been *to still further* investigate unless such had been the previous object, etc.

And under the power and pretext of that Lawrence inquest, defendant in error was required by the Sheriff of the county to attend and testify at it, and bring there with her all the letters and photographs she had of Hillmon (r. 759, 798, 807–8) including a front view (r. 761–2), good picture, tintype (r.760–1, 807–8) of Hillmon and also of Brown (r. 761) standing side by side (r. 759, 760, 761, 800) taken a short time before (r. 762, 800) which tintype she gave to the County Attorney, Mr. Green, or to the Coroner, Dr. Morris, they being there together (r. 763–4, 807–8) and Mr. Green there had it (r. 760) and the same disappeared forever, although she used all reasonable means to get the same back from Mr. Green and the Coroner (r. 762–3–4, 807–8, 798) which *tintype* was an *important item* of evidence to *compare with* the picture of the

corpse in evidence, and also because of the contest at the trial as a matter of identity of the corpse with Hillmon on the question of height of Hillmon and the length of the corpse, and by comparison with the height of the still living Brown (r. 507) and it could, but for the objection of the plaintiff in error and the Mutual Life Insurance Company, have been shown by evidence at the trial that such tin type, recently taken before the death of Hillmon, showed Hillmon to be the tallest of the two, the trial Court on such objection excluding such point of evidence from consideration by the jury (r. 761–2, 835, 238–9, 240–1); if such tintype had not disappeared, its presence in the court would naturally, from the above description thereof, have obviated the grounds of such objection, as shown at record 761, that is, as to how the parties in the picture stood. But whether it would or not, it was competent evidence for many purposes for defendant in error, and the loss or *suppression thereof through* and *because* of so getting it out of her possession and control and not returning it to her (so done with the help of a proceeding helping them to so *investigate* as aforesaid) surely plaintiff in error when it caused exclusion of such evidence became *responsible* and *subject* to the charge of having *suppressed* or *destroyed* evidence *favorable to defendant in error*, on the *question* of *identification* of the dead body as the corpse of Hillmon—a loss occasioned by such as above shown improper use of inquisitorial powers to help the insurance companies investigate a question, surely still failing under such circumstances to produce the missing tintype, it stands against them that they wrongfully *suppressed* or *destroyed* evidence *favorable* to defendant in error in that matter.

Which matter of destroying and suppressing evidence favorable to defendant in error was not abandoned by the representatives of plaintiff in error until the character of John H. Brown for truth and veracity was injured by procuration of the written statement (r. 1284–6) obtained by use of means and in the manner herein referred to, and the disappearance of the aforesaid ring at one of the trials followed those other misfortunes, and the scratching about the figures 5 feet 11 inches on one of the medical examiner's certificates

showed up at the trial of 1895, by which evidence, favorable to defendant in error, in relation to the matter of height of Hillmon, was damaged, as shown at record 156 to 160, 138, and elsewhere, as shown at the parts of the record referred to *ante* in connection with the matter of HILLMON'S HEIGHT, LENGTH OF CORPSE, ETC., after the hopelessness of establishing the evidently manufactured theory of plaintiff in error that Hillmon was less than the height stated in the certificates had become apparent, unless something was done to cast a shadow of doubt on the height as given therein.

When the dead body arrived at Lawrence, Mr. Barker employed, and the inquest there organized, as above shown, John H. Brown having arrived there (r. 347), was interviewed in the office of Mr. Barker (r. 363, 371–2, 375, 511).

And he was also sworn and testified as a witness on that inquest (r. 413, 429, 575), *and there testified that the dead body was that of Hillmon* (r. 575), and after remaining (absent over Sunday) there several days (four or five), (r. 429 to 431), and until about the 10th of April, Mr. Barker told him he was through with him, when he left about 7 o'clock A. M. (r. 431–2) on the railroad and went to his home (r. 433a, 1006, 347a, 72), his father's place near Wyandotte (now Kansas City), Kansas, and from there to his brother, Reuben Brown's place, in Platte County, Mo., a few miles from Kansas City (r. 433–4), and from there starting for Roachport (a place near by), where a bridge was being built (r. 545, 556–7), work of a kind he before had assisted at (r. 352). After being at different places he arrived at Lexington, Mo., May 1, 1879 (r. 436).

And in relation to this matter of Brown's whereabouts and of the efforts of plaintiff in error to scare and induce him to go away, and still farther away, with apparent intention of hoping to get rid of his testimony, and excuse to charge him with fleeing, see what we hereinafter say in relation to assignment of error No. 97 on that subject, including that Barker did not deny telling Brown he was through with him, and thus in practical effect telling him to go whither he would, although Barker testified in the case, as shown at record 1735, in relation to the matter of that inquest.

AND THROUGHOUT THE CASE IT SHOULD BE BORNE IN MIND THAT JOHN H. BROWN DID NOT EVER GO AND SEEK AN ATTORNEY OR THE ADVICE OR HELP OF ANY LAWYER, EITHER BUCHAN OR ANY OTHER, OR GIVE ANY INDICATION THAT HE EVER THOUGHT HE NEEDED ANY ASSISTANCE OR PROTECTION, EITHER FROM BUCHAN OR ANY OTHER—but that, on the contrary, the insurance companies, through Walker, their employee (r. 884–5–6; 1066–7), brought the father of Brown to Buchan (r. 1250) in the spring of 1879, and that thereafter, as shown by the testimony herein, they (the insurance companies), by Buchan, their therefor paid employee (r. 1250, 1262, 1268–9, 1247–8, 1288; r. 1250 to 1288, etc.), pursued Brown until they, by use of the means, methods, influence of Buchan, and wrongful acts, threats and doings, amounting practically to unlawful duress of Brown, wrongfully obtained the false written statement set forth at record 1284–6, Brown passively submitting to the importunities and influence of Buchan, who pretended, notwithstanding his employment and promise of payment by the insurance companies (r. 1262, 1250, 1227, etc.), to Brown to be acting and advising in and for the interest of Brown, claiming to have been employed by the father and a brother of Brown, and thus plaintiff in error, and its assistants, caused and procured Brown to accommodate it and them with that paper, rather than have the threatened use of the great money power of the insurance companies applied in an effort to send him to the penitentiary (r. 473–4, 477, 457–8), to do which *only needed* changing *accidental* to *intentional* killing of Hillmon, and Brown had no witness to the accident, and he had at all times admitted the killing—all used, threatened and applied, as shown by testimony herein particularly referred to.

And any claim of plaintiff in error that Brown made that written statement voluntarily because he wished so to do, or that Brown sent for or wished to see Buchan or through him to communicate with plaintiff in error, or any of the insurance companies, as well as any statement or testimony of Buchan to that effect is, we contend, shown by the evidence in the case to be beyond any reasonable doubt unfounded and false, not merely by considering the testimony of John

H. Brown and Reuben Brown, but also by the testimony of Buchan and of other witnesses called by plaintiff in error, irrespective of any testimony introduced by defendant in error.

And in this connection, to draw attention particularly to the fact that plaintiff in error and its assistants sought the interviews of Buchan with Brown for the purpose of getting such false written statement, we, to state the facts in form of questions, ask why did Walker, the employee of the insurance companies (r. 1066–7), bring the father of Brown to Buchan (r. 1250), and then Walker and Buchan having failed to see Brown (r. 1247, 1281), why did Buchan write (r. 1227, 545–6–8) to Reuben Brown and get him to go with him to try to help get such different (from Brown's previous testimony) and written statement from Brown, as shown at those pages and elsewhere; and why did Buchan commence on and talk to Brown as he did at their interviews; and why did Buchan, Barker, Green and Munn have their several interviews herein referred to in relation to Brown; and why, after Brown had made the so-called proofs of death of Hillmon (r. 1258), did Munn, Barker, etc., urge Buchan on in the matter of getting such written statement, as shown by the testimony of Buchan hereinafter cited; and why did Buchan take pen, ink and paper with him (r. 1269) with which to write it; and why did he take Ward, the officer, along with him on the trip when he procured that document; and why did the insurance companies pay Buchan for all he did (r. 1262, 1247–8, 1288, 1250, etc.) if Brown would or did make that written statement other *than in practical effect on the mind of Brown under duress* and *fear* of being *prosecuted* by the insurance companies for *killing* Hillmon, testimony in relation to all which matters are hereinafter more particularly referred to.

AND THEREFORE THAT DOCUMENT, SAID WRITTEN STATEMENT, WAS IN LEGAL AND EQUITABLE EFFECT FOR ALL INTENTS AND PURPOSES AS BETWEEN PLAINTIFF IN ERROR AND DEFENDANT IN ERROR, ON AND AS TO ALL QUESTIONS OF FACT, AS WELL AS OF LAW INVOLVED IN THIS CASE, THE WRITTEN STATEMEMT, DOCUMENT, ACT AND DEED OF PLAINTIFF IN ERROR, MADE AND PROCURED BY IT, AMONG OTHER THINGS

TO WRONG AND INJURE DEFENDANT IN ERROR, the thereby crushing of the character and reputation for truth and veracity of Brown being a mere incident so far as it affected Brown, which plaintiff in error and its agents seem to regard with indifference, if with help thereof they can save a few dollars to plaintiff in error, by destroying evidence favorable to defendant in error, and with the help thereof otherwise injuring her and her case, and defeat a recovery on the policy, subornation perjury on the part of those who paid for and procured the same being escaped because that paper was not sworn to in any proceeding specified in sections 5392–3, R. S. 1878, a matter duly considered before it was procured (r. 473a, 1295, 457–8a, 1224, 479a, 1347.)

John H. Brown, being up to that time and under the circumstances an important and unimpeachable witness to the fact of the accidental killing of Hillmon, it was evident to the plaintiff in error and its representatives, that unless something could be done to destroy his reputation for truth and veracity, and to cause and procure him to go back on and abandon the truth, and testify falsely, it could not reasonably hope to defeat a recovery on the policy, and thereupon as a chief strand in the web which plaintiff in error and its co-interested insurance companies, by its and their agents, tried as shown by the evidence herein to wrap about and mystify the claims of defendant in error on the policies, it and they commenced to put in operation their scheme to obtain from Brown such false and different statements in writing, and one contrary to what he had sworn to at the inquest, and such an one as that set forth at record 1284–6, as a *weapon* against defendant in error and her claims on the policies, including with which to impeach the credibility of Brown, and thus to injure her.

And by what was done in that matter, plaintiff in error and its associates and its and their agents, itself and themselves, as shown by the evidence hereinafter referred to, INTRODUCED into the case said *written statement*, and made it, and the manner and means by which it was *invented* and *obtained*, and by plaintiff in error and those insurance companies *paid for*, and the wrongful use as a weapon offensive

and defensive it was put to, a part of the case and of its history.

And to assist the Court to understand all that, and our contentions in relation thereto, and to the release pleaded by plaintiff in error (r. 19), we request the attention of the Court to the devious trail, shown by the evidence we hereinafter refer to, made by plaintiff in error, and its assistants, in the matter of procuring that written statement and the release, as a matter necessary to understand before and when considering the matter of that "statement in writing," the "Munn paper," the "release," and the claims of plaintiff in error in relation to conspiracy, and the wrong, unfounded, contrary to fact and unjust claim of plaintiff in error that Brown fled, all made by asking divers refused instructions, as well as to assist the Court to understand why the Walters theory was worked up by Wiseman and others, to fill with Walters the place in said written statement left vacant and delusive after the "Joe Burgess" invention therein became a boomerang on plaintiff in error, as shown in what we hereinafter say in relation to assignments of errors Nos. 105, 74 to 77, etc.

And now resuming our statement, where we left John H. Brown at Lexington, Mo., on May 7th, 1879 (r. 436), two or three days after which date, William J. Buchan, to help manufacture such mentioned web, and to assist in inventing, manufacturing and placing therein, both as a strand and weight, such a written statement, sought out and met Brown at that place (r. 436, 548 to 550, 556, etc). Brown afterwards met Buchan at Parkville, Mo., (r. 439) and he afterwards again, on the 4th of September, 1879, met Buchan, where the written statement set out at record 1284–6 of that date was written by Buchan in his (Buchan's) own language, with pen, ink and paper taken with him (Buchan) when he went to get the same, accompanied by Ward, the Deputy Sheriff of Wyandotte County, Kansas, with no one present other than Buchan and Brown, Reuben and Deputy Sheriff named Ward being near by; Reuben, who assisted Buchan to get Brown to sign such statement, perhaps passing through the room once or twice whilst it was being written, (r. 1236, 1269, 1270,

439, 440, 459) Ward remaining practically with them until after that statement was sworn to at Parkville. (R. 456–7.)

Buchan was a practicing attorney at law at Wyandotte (now Kansas City, Kan.) (r. 1227) acquainted with the whole Brown family (r. 1227), and having been soon after the Lawrence inquest employed by the father of Brown, pretendedly became and was in pretense to Brown such attorney of and for him from then until after the consummation of the matter of procuring that statement from Brown, and the releases from defendant in error (r. 1250–1 and 1247–8), but when we consider the acts of Buchan, it is evident he was really acting for the insurance companies from the time he met Walker, if not before, and *prima facie* Walker brought Brown's father to employ Buchan because sent by Wiseman and others so to do, as shown at record 1250, before Buchan had the interview with Brown at Lexington, Mo., about May 3, 1879.

In April, 1879, Buchan and the before mentioned Walker, who accompanied Wisemen in the interests of the insurance companies to, and was at the time and place when the dead body was exhumed at the Medicine Lodge cemetery (r. 883-4-5-6-7) sought an interview with Brown (r. 1247, 1281), but failed (r. 1247). Brown is not anywhere asked as to whether he knew of that Walker and Buchan's effort to see him unless at record 438a, 1076 about an effort he did not know of.

From and at the time of so with Walker failing to see Brown, Buchan acted as agent, and in the interest of the insurance companies, including plaintiff in error, as shown by his mentioned connection with Walker and by what followed, including their paying him for what he did (r. 1262, 1247-8, 1288, 1250), and having so failed, he (Buchan) through information obtained on his own solicitation (r. 545 to 548, 556-7) from Reuben Brown, learned John H. Brown (still claiming he had so killed Hillmon and that the aforesaid dead body was the corpse of Hilmon) (r. 547-8) would be at Lexington, Mo., on a certain day (r. 561), then without any arrangement having been made for a meeting with John H. Brown (r. 561) and because he, Buchan, *must* see John H. Brown (r. 560) (*why must see him* unless in the interest of the insurance companies) induced Reuben Brown to go with him (Buchan)

to Lexington, Mo., to see if *they*, Buchan and Reuben, could not get a *statement* from John H. Brown, "*different from what he had made, and have the matter straightened up* (r. 548).

Thus clearly alluding to the testimony of John H. Brown at the Lawrence and previous inquests that the dead body was the corpse of Hillmon, and expressing a desire to get the equivalent of the aforesaid written statement, set forth at record 1284-6 (afterwards by the efforts of Buchan and Reuben with the assistance and presence of a Deputy Sheriff obtained as shown).

And then Buchan and Reuben Brown went to Lexington, Mo., and there met John H. Brown about the 3d of May, 1879, (r. 436, 548 to 550, 556,) and then tried to get such *different statement* from John H. Brown, Buchan among other things to scare Brown into making such *different statement* saying to Brown he had got himself into a bad scrape (r. 562) and that his (Buchan's) object was to satisfy the insurance companies, and that if he (Buchan) got such statement, they would let him (Brown) alone, and that there was a *warrant* out for him, (Brown) and that he was liable to be *arrested* at any time, and that he (Buchan) wanted him (Brown) to make some kind of a statement so he (Buchan) could have a, by Buchan, pretended warrant stopped, or stayed for a while at least (r. 548-9), and that if he did not the insurance companies would never pay any attention to what he (Brown) said, and would hunt him (Brown) down and make him out a murderer and a liar, and that he (Buchan) himself was keeping them off the track (meaning of course keeping the insurance men from prosecuting Brown), and that his (Buchan's) object was to satisfy them, and that then meaning if Buchan got from Brown such different statement they (the insurance companies) would let him (Brown) alone, and by doing, saying and urging such further acts and things, as shown by the hereinafter copied questions and answers, (part of the deposition of John H. Brown) and elsewhere on the same subject in relation to the matter of why and how Buchan as agent of the insurance companies procured the written statement and release.

In this connection and throughout the case, including particularly when considering the matter of said copied part of the testimony of John H. Brown and the matter of the 105th assignment of error, it should be borne in mind not only that there was not any competent or other evidence of any warrant having ever been actually issued for the arrest of Brown, or of any criminal proceedings having been actually commenced against him, either for killing Hillmon or for killing any person, or of any actual intention or desire on the part of the insurance companies or their representatives, or of any person or officer whomsoever to have such warrant issued, or if issued, to have the same actually executed by the arrest of Brown, or of actually instituting or prosecuting any such criminal proceedings, but, and also that on the contrary, that all the talk of Buchan about any such warrant or criminal proceedings was evidently only to scare Brown into making such *different* statement, and to induce Reuben Brown to assist him (Buchan) to scare and induce John H. Brown into making such false and *different* statement, and further as Mr. Green, one of the attorneys for plaintiff in error, was County Attorney of Douglas County, where the last inquest was held (r. 576), and as there was as shown by the evidence plenty opportunities to execute any such warrant if desired, or any there was, by arresting John H. Brown, yet there is no pretence that any such warrant, if one really existed, was ever used otherwise than as a scarecrow to operate with on Brown, the lawyers, Messrs. Barker, Green and Buchan, well knowing there was no cause for criminal prosecution against Brown, either on a charge for killing Hillmon, or for killing or as being accessory to the killing of any person of name known or unknown, therefore this matter of pretence about a supposed warrant is important to bear in mind throughout the case so far as it relates to the talk and actions of Buchan and Brown in relation to the matter of the written statement or release.

And in this same connection, and with reference to the matter of refused instructions No. 23, at record 1908; No. 25, record 1909, mentioned in assignment of error No. 98, record 2002; No. 26, record 1909; No. 40, record 1913, mentioned in

assignment of error No. 102, record 2005; and No. 43, record 1914, mentioned in assignment of error No. 40, record 1913, and the conditional agreement of plaintiff in error and other insurance companies, made by Munn, its and their agent, copied at record 580, not to prosecute Brown, etc., made with the assent and without opposition of Messrs. Barker and Green—Green, the County Attorney of the county where that Munn paper was made (r. 576).

We submit it is apparent that plaintiff in error, and all its representatives, including Messrs. Buchan, Munn, Brown and Green, throughout the case, understood and believed that the aforesaid dead body was that of Hillmon, and that such written statement was false, and was made and obtained as and for the purposes in the aforesaid third cause of reply alleged, because if they believed that written statement to be true, it can readily be seen what an improper act each of them did, or assented to, by making, or assenting to the making or accepting, of that so-called "Munn paper" of 6th September, 1879. We are not willing herein to either claim or concede as against any of those men, or as against plaintiff in error, or any of its officers or representatives, that it or they ever actually believed said dead body was that of any person other than that of Hillmon, because of the position they are by their own acts placed in by reason of that "Munn paper" and other acts and doings of theirs herein mentioned, if they did not, at all times, *actually believe* that said dead body was the corpse of Hillmon—this because, considering the whole case as it is, plaintiff in error, and its respective agents and representatives are, by and because of that "Munn paper," and said written statement and release, and of the means and methods and circumstances and reasons under and because of which the same were respectively made and obtained, placed in the position by their own acts, conduct and testimony, of having either attempted to beat a widow out of what they must have believed to be her just dues on and because of the aforesaid paid for policy of insurance, or of doing such extremely wrongful and improper—compromising to them—acts, wrongs and things, as by the aforesaid refused instructions Nos. 23, 25, 26, 40 and 43 plaintiff in

error sought to induce the Court to relieve them in the minds of the jury of any suggestion of, and of thus white-washing plaintiff in error, and its representatives, from the disagreeable position it found itself in when all was exposed by the testimony, and the color and marks placed on it and them, by and because of its and their acts, and what it and they, as its representatives, did, and caused and procured to be done, in and about the matter of that "Munn paper" and said written statement and release; and of Buchan, as attorney for Brown, having done by him, as the testimony of Buchan himself, corroborated by the testimony of John H. Brown and Reuben Brown, herein referred to, shows he did, as paid employee of plaintiff in error, by procuring from and causing Brown, his client, to make that written statement in the manner and under the circumstances the evidence—even his own testimony—shows he did. But as plaintiff in error, and its said agents and representatives, intentionally and voluntarily placed themselves in the position in relation to those matters they found themselves in, when the testimony was all before the Court, we will, as to this part of our brief, leave them on such horn of the dilemma they thus placed and found themselves in, as they may think best for themselves, until it shall be made to appear, as is hereinafter shown, that *as a matter of fact they believed and knew* said written statement to be false, and obtained it to use for the purposes in said reply alleged, and for other wrongful purposes, including destroying, at least injuring and depriving, defendant in error of the otherwise unblemished reputation of Brown for truth and veracity, as well as that of getting Brown to take the part he did—after they had bound and practically placed him at their control and mercy because of that written statement being in their possession—in helping Buchan to get the release from defendant in error.

But Brown, at Lexington, refused to make any such *different statement*, telling Buchan that he had before told the truth, to-wit, that he had so killed Hillmon, and that said dead body was the corpse of Hillmon, and did not fear anything at all from it (r. 548–9), and that he (Brown) had done

what he had and could not help it, and had told the truth (r. 474).

When Buchan at Lexington found that he could not then there get from Brown such different statement, he begged for smaller favors (anything), and persuading Brown that it did not amount to anything if he asked where a dozen Hillmons were at, induced Brown to satisfy and favor him (Buchan) by giving Buchan the exhibit "B" set forth at record 584, 776, 483, dictated by Buchan, as shown at record 482–3, 493–4 and 549, 550, 565, which Buchan did not ever deliver to defendant in error (r. 766), but, on the contrary, gave the same to attorneys acting against her (r. 1264–5, 584, 592–3, 341, 482).

And finding Brown wished to go to his brother Reuben's place (r. 474), Buchan tried to induce and scare Brown into going farther away (r. 474, 550), but Brown knowing his innocence of any crime, and not fearing, as shown by his acts, did return to Reuben's place near Parkville.

Having, by getting that exhibit "B," done that much better than Walker and he did on the previous effort, Buchan within a day or two thereafter, went to Lawrence to communicate with other representatives of the interested insurance companies (r. 1222–3, 1253–4, 1256, 1260), and from that time on until the whole scheme of undoing Brown as a credible witness against those insurance companies and of getting releases from defendant in error, he was, as occasion seemed for the purposes of the scheme to require, in communication with representatives of those insurance companies, Mr. Barker, Green and H. B. Munn (r. 1254, 1256, 1259, 1260–6), Barker at Buchan's office in Wyandotte once or twice (r. 1260), Green at Buchan's office two or three times (r. 1261–2–3).

Buchan having received a letter from either Barker or Green asking him to meet them at the Coates House in Kansas City, (r. 1255–6) did so (r. 1256, etc.) twice (r. 1268) and there Mr. Barker and Munn informed Buchan that Brown had made proofs of death (meaning that Brown had made

affidavits—doubtless three, one to serve on each of the three insurance companies—that the aforesaid dead body was that of Hillmon so by Brown accidentally killed as aforesaid) record 1258, and then they wanted Buchan to go and see Brown, *and find out about it and see what he* (*Brown*) *was going to do about it* (r. 1258, 1261, 1268) and *what he* (*Buchan*) *was going to do* (r. 1258, 1261–2, 1268), and promised to (and did) pay him, Buchan (r. 1262.)

And as Brown had at inquest sworn that the dead body was that of Hillmon, and Brown had made such proofs of Hillmon's death *it*, of course, appeared to those four gentlemen, representatives of the insurance companies, that if Brown was to be either choked off the witness stand or prevented from testifying as he had before done, or his credibility as a witness destroyed, and the value of his then and previous unblemished character for truth and veracity taken from defendant in error, it must be done *quickly* and *as effectually* as possible, after the last of those interviews had at the Coates House on the 3rd of September, 1879 (r. 1268) —and thereupon on the next day (September 4th) Buchan—showing and having made up his mind *what he was going to do*. Taking Ward, a Deputy Sheriff of Wyandotte County, Kansas, with him, and who remained with him until he had got the statement of 4th September, (r. 1291, 1281, 1234–5, 1238, 455, 571, 417, 439, 478, 479, 551, 553, 554) and also taking *pen*, *ink* and *paper*, *with which* to *write the same* with him, (r. 1269) and a fast team (r. 1291) and buggy he (Buchan) went and found Brown at Reuben Brown's place engaged in *honest labor* (r. 439, 551), notwithstanding the previous unsuccessful effort of Buchan to get Brown to go farther away (r. 474, 550), and of an effort of Wiseman at the time of the Lawrence inquest to run Brown off (r. 1252–3–4), from all which we see any effort of plaintiff in error to claim Brown *ever fled* is not only unfounded but made to unjustly increase prejudice against him, and then they (Buchan and Ward) with the team and buggy, went to where Brown was working and brought Brown to Reuben's house (r. 551, 474, 568).

And to help induce and persuade Brown to let him (Buchan) write such *different* statement for him (Brown) to

sign and swear to as Buchan wished to procure, he (Buchan) among other things as a lawyer and attorney for Brown in substance and effect, informed and said to Brown, and also advised him *as his lawyer and friend* thas he was not doing anything wrong *at all*, and as to such (*different*) *statement not being true*, it did not make any difference at all; that he, Brown, was not throwing himself liable, and that it could not be used in law (r. 473, 479), and that he would insure him such statement would never be against him in law anywhere, and as he was acting as his attorney, he would stand between him and all danger (r. 457); that it was not lawful and could not be used in law, and that it was only to please the insurance men (r. 479), evidently referring to the fact that it was not being made under such circumstances or in such proceeding as to make it being false swearing thereto, perjury within the meaning of Section 5392, R. S. 1878, page 1059.

And that *he* (BUCHAN) and *every one he knew*, unless he excepted the insurance men (r. 473), believed Brown's *previous statement to be true*, but that the insurance men would break it down, as THEY *had the money to do it with*, but if they got such statement they, meaning the insurance men, would be satisfied (r. 473), and that *it would be better* for *them* to make *such statement* than it would be for Brown to be *arrested* and put in *jail*, and probably go to the *penitentiary* (Buchan still having the aforesaid exhibit B [r. 580, 766, 1231, 1265] like unto a set of fetters on Brown), and that if the insurance men once got him in jail, they would make him out a *liar* and *murderer*, and if he (Brown) didn't give him such statement he (Buchan) couldn't do any more for him; that he had been trying to do all he could for him, and that he was only advising him for the best, and that Brown would have to do something (then) *now or never;* that Ward, the Deputy Sheriff of Wyandotte County, would probably take him (Brown) (then) now (r. 457–8), and that he would not advise him to do anything but what was all satisfactory, secretly meaning of course to the representatives of the insurance companies, and would back him in it, whereupon (and after such further talk and proceedings between the four, Buchan, Ward, Reuben and Brown, as herein referred to), Brown, in his lack of legal

and worldly knowledge, relying on Buchan in what he (Brown) not unnaturally, considering all the circumstances, supposed his helpless condition, and he being so pressed and given away by his legal adviser, who he of course then supposed was acting in good faith, succumbed to his, then to him apparent fate, and giving himself into the power of an enemy he supposed to be his attorney, and not as he really was in the employ of plaintiff in error and the other insurance companies, as shown at record 1262, 1250, told Buchan that if he thought it was right he would just leave it to him, and then they went into the house to which Buchan and Ward had so brought Brown from his labor as aforesaid, and Buchan pulled out the table and wrote the said statement of 4th of September, 1879 (r. 473, 440, 553) *in his own language* (r. 1236–7, 1261, 1269, 1270). He (Buchan) *when* and *before he wrote* the same, knowing that Brown had, at inquests held in Lawrence and Barber County, previously sworn that the aforesaid dead body was that of Hillmon, and had made the aforesaid proof of death (r. 1258, 1264, 1283, 1288, 575, 427) and not knowing of any evidence against Brown, his client, in relation to the matter (r. 1264), and he (Buchan) so himself invented *and wrote* the same (that statement of 4th of September, 1879), the same being a false statement (r. 418, A. 777; 519, A. 130), as Buchan as herein shown (r. 473–4; 517, A. 115), conceded it would be *without* Brown having ever told him (Buchan) that he (Brown) had not killed Hillmon (r. 436–7, A. 1059, 1068, 1069), and without Brown having ever told him (Buchan) any such things as stated in that written statement of 4th of September, 1879 (r. 436–7, 441–2–3, 444–5–6–7–8–9, 450, 452–3, 472–3–4, 477–8, questions and answers 1059, 1060, 1112 to 1146, 1175–6, 1184–5–6, 1294 to 1299, 1332, 1346 to 1350, and r. 502–3–4, A. 53 to 60 and 70 to 77). But on the contrary, Buchan *so invented* and so *wrote* the same after Brown had time and again told him (Buchan) that he (Brown) killed Hillmon accidentally (r. 405, A. 630; 473–4, A. 1298) and had before (meaning at the inquest, etc.) made true statements (referring to his statements at the inquests and elsewhere that he so accidentally killed Hillmon) (r. 548, 552–3, 569, 570–1), and he (Buchan) really believing such previous statements of

Brown that he had so killed Hillmon to be true (r. 473-4; 517, A. 115), wanting it, such invented and different statement with which to get big money from the insurance companies (r. 473).

And after they, Buchan and Brown, had had such conversations, and Buchan had used such arguments, inducements, statements, means and threats, both covert and direct, to Brown of his (Brown's) being pursued by the insurance companies and immediately *arrested, put in jail and tried for murder and sent to the penitentiary* (because of power of the insurance companies) as shown by the testimony, including and as shown by the following copied parts of the deposition of John H. Brown, testimony not properly cross-examination, but brought out by questions asked by attorneys for the insurance companies when the deposition of Brown was taken about January 1882, under the notice at record 341 and agreement at record 318, some of which questions and answers are as follows, to-wit:

"Q. 1223. At whose request, or by whose directions, was it destroyed?

"A. 1223. By Buchan's and myself both, that I should destroy it; that was his promise to me when I made the statement out.

"Q. 1224. What was his promise to you when you made the statement out; what was said about the destruction of it at that time?

"A. 1224. He said that he would insure me that his statement would never be against me in law anywhere, and to convince me that it wasn't lawful and if I would allow him, for us, to make this statement he would give it back to me and I could destroy it; that to convince me that it would never be used against me, there would not be a scratch of a pen contrary to the two testimonies that I had testified before, and as he was acting as my attorney that he would stand between me and all danger. He told me that it would be better to allow him to do that than it would be to be arrested and put in jail and probably go to the penitentiary, and that if the insurance men once got me in jail that they would make

me out a liar and murderer; and if I didn't, he couldn't do any more for me; that he had been trying to do all he could for me, and that he was only advising me for the best, and that I would have to do something now or never, that Ward, the deputy sheriff of Wyandotte county would probably take me now.

"Q. 1216. The defendant's attorney here repeats the question: What was his promise to you when you made the statement out; what was said about the destruction of it at that time?

"A. 1216. He said that he would hand it back to me, and that I could destroy it myself." (R. 457–8.)

"Q. 1294. State anything else which was said to you by Buchan relative to your making or signing that statement, giving the time and place where the conversation occurred.

"A. 1294. He told me if I would submit to that statement, or allow him to make that statement it would be the best thing that I could do, and that they then would let me alone; and if I didn't, they never would. And as far as that statement, the insurance men would have to pay him damn big money for it; and that he would give my brother, Rube, $100 for a horse that he had over there, and for me to ride it over the next time I came over and that he would buy the horse from him and give him to me; that is about all I remember of now.

"Q. 1295. State anything else in regard to that matter, which you remember.

"A. 1295. And that he would pay me about $40 that his brother had owed me, and more too, because I had befriended his brother when he wasn't able to; and that he wouldn't persuade me to do anything wrong for all the money the insurance company had got, and only advised me as my lawyer and a friend, and assured me that I wasn't doing anything wrong at all; and as to the statement not being true, it didn't make any difference at all, that I wasn't throwing myself liable and that it couldn't be used in law, and to convince me of that he would return me the paper and I could tear it up; and that he was satisfied and everyone else he knew, except

insurance men, that my true statement was so, and that everybody believed them; but the insurance men would break it down as they had the money to do it with, but if they got this statement they would be satisfied and there would be no more of it; I don't recollect of anything else just now.

"Q. 1296. When and where did this conversation between you and Buchan, which you have mentioned in your last two answers, first occur or take place?

"A. 1296. The conversation in general took place at Fulton's mill in Platte County, Missouri, and on the way to my brother's and about his stable and house. That's as near as I can tell you where it occurred.

"Q. 1297. When did Buchan first speak to you about making a statement in this matter?

"A. 1297. At Lexington, Missouri, in May, 1879.

"Q. 1298. State what Buchan said to you at that time about making a statement.

"A. 1298. He first said he had come down here to see me; that my father and brother Thorn had employed him to act as my lawyer or attorney in this Hillmon trouble between her and the insurance men; he asked me how it was, and I told him just as near as I could; and he said he knew that and had heard of it before, and told me that wasn't the point he wanted to get at, and that I stood in a rather dangerous place; that the insurance men would never pay any attention to what I said, and that his object was to satisfy them, and then they would let me alone, and that they would not until he did satisfy them; and that all this difficulty and trouble was left with him and no one else, and whatever compromise was made would be satisfactory with them, and what he wanted to get a statement from me to make it appear that it wasn't Hillmon who was killed, but some one else. And I told him that that was something that couldn't be done, that I had done what I said and couldn't help it, and told him I didn't see how I could do it. He said he could in several different ways; that he could find somebody froze to death or find somebody killed and that all that would be changed

in the testimony would be by making out that there was someone else killed besides Hillmon. I told (———) that (———) couldn't be done; says I, Bill, you know that that cannot be done. Says he, John, you know that I am a lawyer and could plan out anything of that kind a good deal easier than I can. I told him that I couldn't help that, that I had done what I did, and to help it I couldn't. He told me that if I didn't do something of that kind the insurance men would hunt me down and make me out a murderer and a liar. He told me that he couldn't do anything for me unless I would (believed) and paid attention to him, and that it was the only way I could ever keep the insurance men away from me or off of me, and that they was hunting for me and had been, and that it was himself keeping them off the track, and that if I didn't do anything now, to keep away from Parkville or Wyandotte. I then wanted to go up to my brother's and drive team for him; he wanted me to. Says he, John, for God's sake, don't do that; for to get away from Lexington. He says, I have got a hundred dollars here and I will give you fifteen dollars; that will take you away from here and find you a job somewhere else, and he wanted to know where I was all the time. I told him he could find out through Rube, that I was writing backwards and forwards to him once and a while; that was about the substance of the conversation there at Lexington at that time.

"Q. 1299. Was there anything else said by Buchan at that time about your making a statement?

"A. 1299. He said that he had it all pictured out, and he could make it appear very easy in his statement that this fellow had got into the wagon to ride with us was the man killed and not Hillmon; I don't remember of anything else just now. (R. 472–3–4.)

"Q. 1332. State what part of the conversation between you and Buchan, on or about the 4th day of September, 1879, took place at or near Fulton's Mill, what portion between there and your brother's house, and what portion at or near the stable on your brother's farm?

"A. 1332. His conversation with me at the mill the first time was in regard to me and him making out a statement,

and that it had to be now or never, as he had kept them fellows off just as long as he could, and that he was only trying to get me to do just what anyone else would, and if I would consent to let him do it it wouldn't take him a great while, and that I wouldn't have any more trouble about it. And the conversation was that (talked about in general) from there all the way to my brother's stable and the house. (R. 477.)

"Q. 1346. State what was said between you and Buchan in regard to this matter at or near the barn after dinner, when you say your brother was present?

"A. 1346. Buchan asked my brother if he didn't think he had offered fair with me; if he didn't think he could smooth this all over and make it look plain and satisfactory without a doubt; whether it wouldn't be the best to consent to it, and if I did he could go to the house and do it up in a little of no time, and that he had paper, pen and ink with him, and I told him that I would.

"Q. 1347. Was there anything else said at that time between your brother and Buchan or yourself and Buchan?

"A. 1347. My brother asked him if he didn't think I would be laying myself liable by doing anything of that kind. He told him no, and that it wasn't lawful and couldn't be used in law, and that he would stand between me and all danger; that it was only to please the insurance men. I told Buchan if he thought it was right I would just leave it with him. He told me he wouldn't advise me to do anything but what was all satisfactory, and would back me in it.

"Q. 1348. Have you stated fully now all that was said about that matter when your brother was present?

"A. 1349. All that I recollect of now.

"Q. 1350. What did you and Buchan then do?

"A. 1350. Went to the house, pulled out the table to commence writing." (R. 478–9.)

And in this connection we refer to some of the testimony of Reuben Brown on the same subject, corroborating the foregoing, set forth at record 552–3, 569–570–1.

It will be noticed that all along Brown conceded he had accidentally killed Hillmon—and that to make that killing *murder* of his friend and sole companion only required *ignoring* of the one word "accidental," and plaintiff in error by its paid agent (r. 1262; 1247–8, 1288) Buchan, under pretence that Buchan was acting in the interest of Brown and as his (Brown's) attorney, pretendedly employed by his father, with the help of the presence of the officer (Ward) bluffed and scared Brown into signing the written statement rather than risk the, by plaintiff in error through Buchan, its agent, threatened use of the money power of plaintiff in error and its assistants to bunco those who sometimes misadminister justice (an important element of the case in the mind of the average man) into ignoring the "accidental" part of the sad affair which happened on the banks of Crooked Creek, and push him (Brown) into a cell in the penitentiary for killing Hillmon, unless he would give plaintiff in error the supposed benefit of the tissue of falsehoods set forth in the written statement, by plaintiff in error misnamed "Brown's affidavit, statement or confession," instead of designating it by a name descriptive of the facts and methods used to produce it by calling it "A document or club which shows as applied to the testimony in the case what a corrupt use of money can do with the help of misapplied genius, reckless audacity and disregard of duty," and which written statement thus obtained is still waived by the plaintiff in error as shown by its 105th assignment of error as a banner to be proud of, and under which it hopes yet to march to victory; itself evidently being unable because of some peculiarity in its organization to comprehend the position it is in, because of the facts in relation to the matter of the document, including payment for its procuration after the employment of Buchan, shown at record 1262, 1250, etc., and of the collapse of the edifice of conspiracy, murder and fraud by help thereof, it attempted to construct, caused by the refusal of the "Burgess called Joe" to remain dead, referred to hereinafter in relation to the matter of that 105th assignment of error, and of the misfit of his proposed substitute (Walters) to answer as an original of the corpse, referred to hereinafter in relation to the matter

of the 74th to 77th and 84th assignments of error relating to the so-called Walters theory, as well as in the foregoing part of this statement part of this brief.

It can readily be understood that Brown, because of his not being acquainted with procedure in courts, could be easily led by Buchan into the belief that courts could be used as a means to carry into execution his threats about the use of money, power, etc., shown by the before copied part of the deposition, and of course notice will be taken of the common belief such things are sometimes done, all of which of course operated on Brown when he yielded to and gave way under and because of those threats so made, under the circumstances in which Brown was situated, by plaintiff in error through its hired agent, Buchan, record 1262, etc., and all which matters plaintiff in error evidently hopes and expects will, because of its exalted position and assumed attitude in this contest between it and a woman from the prairies, be ignored, forgotten, and remain unmentioned as against it, and that Brown will be made a scapegoat of to bear alone all the infamy shown by the invention and use made of that written instrument.

Buchan, having got the statement, went with Ward, the Deputy Sheriff, and Brown, to have it sworn to (r. 571, 456, 1237, etc.), by which actions of Buchan and Ward and the threats and representations of Buchan, attorney of Brown so made—Ward, an officer, being there (Brown of course would not under the circumstances, consider or count on a state boundary question in relation to the matter of arrest)—*Brown was practically placed in duress*, and so held until the release from defendant in error was obtained.

And the acts of Buchan and Brown, including the statement of Buchan to Brown, made a few days afterwards at Wyandotte, after Buchan procured the RELEASE, to the effect that he (Brown) *was free* to go anywhere (r. 501–2a, 50), shows that both Buchan and Brown considered that from the time Buchan and Ward found Brown at work at Reuben's place and took him to the house there, at the time Brown signed said STATEMENT, on the 4th of September, 1879, that he (Brown) was practically in duress, and that Brown sup-

posed himself bound and that he had to do and say whatever Buchan might request him to do or say.

Reuben Brown, evidently, did what he did in the matter of helping Buchan get that statement from Brown out of fear of his brother being unjustly, viciously persecuted by the insurance companies (r. 571–2), and that he so assisted Buchan because of such fear, is shown by his deposition (r. 544 to 575).

And further, that statement of 4th September, 1879, bears on its face evidence, conclusive evidence, we claim, that it (said statement) *was false*, and that *it was invented* and *manufactured* by a representative of the insurance companies, by *use therein* of the words, "he said his name was either Berkley or Burgess, or something sounding like that; we always called him Joe" (r. 1285), coupled with the testimony of the aforesaid agent of the insurance companies, Theodore Wiseman, a witness called by them (r. 854), who, as shown at record 903–6–8, testified to the effect that the representatives of the insurance companies acting in the matter were proclaiming the dead body before mentioned was the corpse of one "Joe Burgess" or Nichols, but finally found those two men were still living, and gave that claim up (r. 903–6–8), but too late to place any other name in lieu thereof in that statement; the coincidence of the name — Joe Burgess — in such connections can only be accounted for by conceding that the statement was falsely *invented* and *manufactured* by a representative of the insurance companies (in communication with Wiseman), as shown by the testimony of Reuben and John H. Brown. And the matter of that *name*, irrespective of other evidence on the subject, proves that so obtained written statement was *not a truthful* statement, or made as such, but a mere manufactured invention, made and invented by plaintiff in error and its assistants, by Buchan, the paid employee of the insurance companies, including plaintiff in error (r. 1262, 1247–8, 1288) to destroy the credibility of John H. Brown, and to compel him to help procure the releases and to be used in obtaining them, as alleged in the aforesaid third cause of reply — all as more fully hereinafter shown in

connection with our argument in relation to the matter of assignment of error No. 105.

After having on the 4th of September so obtained that written statement shown at record 1284–6, and thus answered the questions and supplied the wants of the insurance companies asked and expressed the day previous through Mr. Munn and Barker at the Coates House, *as to what he* (*Buchan*) *and Brown were going to do about it* (alluding to Brown's having made such proofs of death after all that had been done in behalf of the insurance companies to run him off and coerce him, as before shown) (r. 1258, 1260–1–2, 1268), for the next step in the program or scheme to defeat the policies and any claim thereon, the insurance companies having so ascertained Buchan could do *some things, they*, by H. B. Munn, on the next day, September 5th, gave him written authority, set forth at record 1249, as follows:

"Ex. H. Nov. '99, W. C. E. Judge.

"*W. J. Buchan, Esqr.*

"DEAR SIR:—On behalf of the Mutual Life, New York, Connecticut Mutual Life, I hereby authorize & employ you to procure the surrender of the policies of insurance on the life of John W. Hillmon. H. B. MUNN.

"Kansas City, Sept. 5, 1879."

And on the next day, September 6, 1879, those insurance companies, including plaintiff in error, by their agent, H. B. Munn, gave to Buchan a further paper, set forth at record 580, as follows:

"The undersigned attorney, representing the Mutual Life Insurance Company of New York, the (The) New York Life Insurance Company of New York, and the Connecticut Mutual Life Insurance Company, hereby stipulate and agree, so far as said companies are concerned, to desist from any further pursuit and prosecution of John W. Hillmon, John H. Brown, or any other parties in connection with the Hillmon cases, provided the respective policies are surrendered and order for their delivery executed and all claims under the same released to said companies by Sallie E. Hillmon, wife

of said John W. Hillmon and beneficiary under said policies, and in so doing represent their officers and agents everywhere.

"LAWRENCE, KANSAS, September 6th, 1879.

"H. B. MUNN."

Which last copied paper Buchan required before he would leave the said statement of 4th of September with Munn or the other representatives of the insurance companies, or give them benefit thereof, as shown at record 582, 1238–9, 1271–2–3–4, 577 to 584, 592, and there was soon a more formal agreement made between the insurance companies by Munn, their agent, and Buchan that he should be paid for getting up the policies if he could, but that nothing should be paid defendant in error therefor. (R. 581, 592.)

And Buchan informed Brown of said Munn paper of 6th of September, 1879, and explained the effect thereof to him (see the proviso therein) (r. 1279, 1290), and then Buchan proceeded to get the release, including that (r. 19) plead and relied on herein by plaintiff in error.

Buchan having and of course using the proviso in that Munn paper of 6th of September as a spur on Brown, Buchan holding the aforesaid exhibit B and said statement of 4th of September, 1879, apparently to Brown, practically a rope around his neck.

And then through Brown Buchan obtained an interview with defendant in error at Leavenworth, as shown at record 496-7-8-9, 517, 768-9, 817-18-19; and when to keep the arrangement for such interview defendant in error arrived at Leavenworth, Buchan met her as she came on a train at the depot (r. 769) in time to prevent her going alone to the office of Clough & Wheat, which they afterwards visited, and at his request they went to the Planters Hotel (r. 770) and there he and Brown procured the releases in the manner, under the circumstances, and by the use of such means and methods as shown in the part of our brief and argument herein in relation to assignments of errors 27 to 32, 59 and 105, relative to the matter of the release "Munn paper" and the aforesaid written statement procured from Brown as before mentioned; and

that part of our brief is here referred to in this connection as a statement of the facts relating to those papers respectively, and from which it will be seen that the releases were obtained from her without consideration, without her knowing what they were, and when she was sick and prostrated and wholly subject to the orders and directions of Buchan, coming on her in all its force after she had failed during a long interview to partake of dinner further than to drink a cup of tea Buchan brought her *himself*, instead of by an hotel waiter.

Having so obtained those releases on the next day, September 16, 1879, Buchan handed said statement of 4th September, 1879, to Brown, and such conversation occurred between them, as shown by Brown's testimony at record 502, in the words following:

"'Here, John, is that paper that I promised to return back to you.' And he said I could take it and destroy it or tear it up, or do as I pleased with it, and I tore it up and put it in the stove, and then Buchan told me that that now was forever settled, and that there wouldn't be any more trouble about this matter at all, and that that was the end of it, and says he: 'John, there ain't the scratch of a pen against you about this difficulty anywhere,' only my true statement that I had made at Lawrence, and that I was free to go anywhere, was about the substance of the conversation, as well as I can recollect now."

And then that statement was torn and put in the stove, used as a waste basket, in Buchan's office in Wyandotte, in pursuance of the before made promises of Buchan to Brown, to the effect that when it should have answered the purposes for which it was obtained it might be destroyed, and that be the end of it. (R. 502, 520, 457–8, 464, 1276, 1246.)

On the 13th of September, 1879, evidently in contemplation of the (by Buchan) promised return to Brown of that written statement, Buchan and Green made the (by them) certified copy thereof (r. 1275–6–7, 1283–4–5–6–7, 1901–2) as a sort of guaranty (r. 1283), (guaranty of what Buchan slid away from saying), evidently to help in the matter of, whilst

apparently by such supposed destruction of that false written statement, keeping to Brown the promise of Buchan that it should be returned to him to destroy (r. 502, 520, 457–8, 864), and nothing left but his before made *true* statements made at Lawrence, etc., to the effect that he had so killed, and that the dead body was that of Hillmon (r. 502, 457–8), they might, by having such certified copy—and the torn original to be as it was rescued by Buchan—to hold and use as occasion might require, which we see they did not fail to do.

But—and faithful to the insurance companies, including plaintiff in error, who employed and paid him for what he did (r. 1247–8, 1250–1, 1262, 1288)—Buchan afterwards, in the absence of Brown (r. 1280), took (fished) the *same* (that torn statement) out of the stove and preserved it (r. 1276, 1277–8, 1280) until he afterwards—when Brown's deposition was being taken—gave it to the attorneys for the insurance companies (r. 1278, 1280, 1283–4, 583), and at the same time gave to those attorneys the aforesaid Exhibit B (r. 1289, 1290, 584), who produced both of the same at the trial (r. 584, 1283–4). But they (those attorneys) asked Brown questions, as shown by that deposition, as to the contents of that written statement, without showing it, or any part thereof, or his signature thereto, or the before mentioned certified copy thereof, to him.

And further, the statement of Buchan in that last before copied part (r. 502) of said deposition, to the effect that Brown was—then on 16th September, 1879—"*free* to go *anywhere*," itself proves that one of the objects and purposes of Buchan and the other representatives of the insurance companies in getting that statement was, among other things, to use it and Brown to assist them in so obtaining such releases, as well as to ruin the credibility of Brown and his character for truth and veracity if possible so to do, and thus to injure defendant in error and destroy evidence against the insurance companies—and that such was the purpose and object of getting that statement from Brown is further and fully shown by the statement of Buchan at record 1294, as follows:

"As I understand it, as I recollect it, I had this copy, this copy—in my handwriting—when I returned the policies. I got it from Green, and had it in my possession until the taking of John Brown's deposition."

By thus using the words, "returned the policies," he of course meant "delivered the releases and order," as by him mentioned at record 1247 (as there is no pretense he ever had the policies).

And when Buchan had completed his work of injuring defendant in error and the evidence in her expected cases on the policies against the insurance companies, by reason of that statement, so obtained, and with help thereof (with their great moneyed power, explained by plaintiff in error by its agent, Buchan, to Brown (r. 473, A. 1295), and to defendant in error (r. 771; 500, A. 36), as a means by use of which right, truth and justice could and would be thwarted and rendered of no avail, suppressed, trampled under foot, caused to be ignored, recovery on the policy prevented, and which, included among other things, a threat to use money, if needed, to produce disagreement of juries—and disagreement occurred at four trials, no matter how caused—and had also in the manner, and as shown, wrung from defendant in error, when she was thus overwhelmed, sick, etc., those releases, those insurance companies, including plaintiff in error, paid Buchan for what he had done (r. 1247–8, 1888, 1262, 581, 592), and when occasion required, plead the release to plaintiff in error. (R. 19.)

And—in addition to the fact that Buchan, as shown at record 1262, 580, 581, 592, and elsewhere, had been expressly employed to get such false statement and releases—those insurance companies including, by making such payment, as well as again by pleading such release, plaintiff in error accepted, approved and ratified as and to be their own acts respectively—all that Buchan, Munn, Barker, Green, Wiseman or Ward did or said in or about the matter of procuring that statement of 4th September, 1879, or any of said releases, as well as what John H. Brown did and said to get the releases, and also what Reuben Brown did and said to induce

John H. Brown to give Buchan that statement, to such extent that plaintiff in error stands charged with all thereof, as to all questions and points, either of law or of fact, in this case, the same as any individual party would in similar case.

And if for plaintiff in error the equivalent of the words, "*flight of Brown*," shall be used in brief or argument, we, for response thereto, request attention to our answer herein to the 97th assignment of error.

BRIEF OF THE ARGUMENT FOR THE RESPONDENT AND DEFENDANT IN ERROR.

OBJECTIONS TO JURISDICTION IN THIS COURT TO REVIEW THE RECORD IN THIS CASE.

We assume it will be conceded that this is a court of limited jurisdiction as to the class and kind of cases of which it has jurisdiction, and that it has not jurisdiction of any case unless given it by the Constitution, or by Act of Congress, and that there is not now in force any Act of Congress giving it jurisdiction in this or any similar case, in which, in an action at law the facts have been tried by a jury and judgment rendered thereon in the trial Court, and such judgment has been affirmed by the Court of Appeals, unless jurisdiction is given this Court to review the record and determine this case by the hereinafter copied paragraph in Section 6, of the Act of March 3,1891, 26 U. S. S. 828, which includes the words, "by certiorari or otherwise."

And we contend that said Section 6 is, if it attempts to give such jurisdiction *void* as to this and any similar case, for many reasons, among others, because the substance, spirit and effect of the Constitution and Laws of this country are, among other things, to the effect, that all persons as to all such matters as any question involved in this case are, and shall be equal, and have the same rights, without special favors to any, and that there shall not be discrimination either in favor of or against any person whomsoever, for any purpose

whatsoever in any respect, or power given to any Court or officer to so discriminate.

And in support of that proposition we refer without specific designation or reference to title of case, to the numerous decisions of this and other Courts, to the effect, that there shall not be any such discrimination, or *power* given to make it, and that any law by which it is attempted to give such discriminating power, is to that extent void.

And we contend that said Section 6 is obnoxious to the rules and principles of law enunciated by such cases, and indicated by the genius, spirit and intent of the foundation principles, Constitution and Laws of this country, to the effect that all persons as to such matters and questions as are involved in this or any similar case, are equal, and shall have equal rights before the Courts and everywhere, in all respects, without favors to any, and that power to discriminate or *grant favors to any* shall not and cannot be given unless, nor further than as, a *right* is given to all persons similarly situated to have such *favor* or *benefit*.

If that part of said Section 6 is applicable to this or any similar case, then we submit that the words therein, "certiorari or otherwise," is a misnomer, and should have read "writ of favor," because said Section 6 does not purport to give a *right* to plaintiff in error, or to any person, in cases similar to this, to have the record reviewed in or by this Court, no matter what may be the nature of the question involved, but on the contrary, if that section is applicable to this case, it purports to give this Court power to review the record in this and in cases similar to this, if it sees fit, *elects* or *chooses* so to do, not because plaintiff in error or any applicant had or has a *right* to require this Court to review the record and determine any question involved or made in the case, but merely and only because this Court chooses, elects and sees fit so to do, leaving it to this Court to reject the application of any *other applicant* for a review of a *similar* record *if the Court chooses so to do*, thus making the matter of a review by this Court of this, or of any record involving similar questions, a mere matter of *favor granted* or *not*, as this Court may *see fit*. And we contend that any attempt on the part

of Congress to *grant such power* is *not within* a legitimate exercise of any legislative authority conferred on or existing in Congress, and that if the language used in that Section 6 is, as to this Court, applicable to this or any similar case, then that Congress has thereby attempted to create a power to discriminate between individuals, to *grant* favors to one and *deny* similar favors to another, a power possessed only by an absolute monarch in a country in which *his will*, as to favors, and not any *established rule of law*, is *that* which *controls* and *determines* the rights of persons and property, and not applicable in a country which purports to be governed by *laws* and *established rules*, determining the *rights* of persons and parties, without special favors to any.

And we contend there cannot be, and has not been, any legislation in this country more obnoxious as attempting to create or authorize favoritism or to distinguish between persons, classes of persons, or their rights, of the kind called class legislation, or by any other term, than said Section 6 is, if applicable to this or any similar case, and therefore we claim that if said Section 6 is by its terms applicable to this or to any similar case, it is to that extent void. If that Section 6 is applicable to such cases as this and valid, then it follows that all persons obtaining judgments in the trial court and a judgment of affirmance thereof in a court of appeals, hold their rights thereto subject not to a *right* of the defeated party to have a review of the record in, and determination by, this Court of the question as to whether reversible error was committed, but to the question as to whether this Court *will* or *will not*, as it may *elect*, favor such defeated party with a review of the record and determination of the case, and that in one case to one applicant, it may, so far as that section is concerned or goes, say *yes*, that it will examine and consider whether it will relieve from what it considers error in the record by reviewing and determining the same, whilst in *another* and *similar case* leaving this Court to say *no*, and that it will not examine or review the record, or consider whether wrong or error has been committed or not, although the questions involved and the parties to the *respective* records may, in *legal effect* and as to rights and *questions*

involved, be the same in each case. In this case there is not any question involved or law under or because of which it can be claimed that this Court has jurisdiction other than because of the part of said Section 6 which includes the misused words "certiorari or otherwise," which we contend should have read "writ of favor," to have described the same by language appropriate to the discriminative power attempted to be granted.

It is, of course, always a great favor for a party to have a *chance* and *right* to have the record reviewed in a case in which the party has been defeated, but we submit any law which leaves it to any officer or court to say whether the review shall be had or not *as such officer or court may elect*, is and of right ought to be held void, and is contrary to the principles and against the meaning, terms and effect of constitutional government, and governments regulated by law, in which the rights of parties are made to depend upon the *laws* and *rights* given by *law* instead of depending upon the *will* or pleasure of any officer or court, and this question and objection does not affect the rights of any person to have a record reviewed by a higher court to determine whether a reversible error has been committed or not, *if the right* to such review for such purpose is given by *law* instead of being attempted to be given *if* some officer or court *chooses* or *sees* fit *so to do.*

And we contend that the questions involved in this case are not any of them such as should give excuse for claiming that there ought to be power in Congress to enact such *discriminative legislation* as to give this Court jurisdiction to act on the record herein, *without* at the same time enacting that *every person* defeated in a Court of Appeals shall have right to have the record reviewed and the case determined in this Court, no matter *what* or *how commonplace* the *questions involved* may be, such only being the nature of the questions involved herein.

By the referred to part of said Section 6, the axiomatic principle of our government expressed by saying, "Equal rights to all, special privileges to none," however covertly attempted to be given, is slaughtered, and placed high on

the shelf of things to be used as occasion may render agreeable.

And it is no answer to all this to claim this Court will do justly in the matter, because the question involved is as to whether "there shall or shall not be special favors to any," or whether it can be left to any branch of the government in the exercise of discriminative power attempted to be given to say "whether there shall be or not."

Second. And further and irrespective of anything before said on the subject, we contend this Court has not jurisdiction to review the record herein or determine this case, because in this case, the same being an action at law, the facts were in the trial court tried by a jury, and they found for the plaintiff in that Court, defendant in error here, and on their verdict that trial court rendered judgment to the effect that she have and recover of and from plaintiff in error the amount of that verdict, $11,034.00 and costs of suit (r. 117–18, 1928–9), whereby she in legal effect, became and was entitled to, and possessed of, property rights, that is, the tried and *judicially determined right* to that sum of money and costs, and to have, collect and receive the same from, and out of the property of. plaintiff in error, secured to her by that judgment, subject to a right in plaintiff in error to require the Court of Appeals to review the record, which it did, and on the 3d of April, 1901, affirmed said judgment of the trial court (r. 2030).

And by the 5th amendment to the Constitution, defendant in error is secured against being *deprived* of her said *property rights* otherwise than by *due process of law.*

And we contend the proceedings under and because of which this case is now claimed to be in this Court is not *due process of law*, within the meaning of that 5th amendment, but merely because this Court has seen fit to *give* plaintiff in error a *chance* to get away from those judgments and the effect thereof, without any *right* in plaintiff in error to require this Court to review the record or determine any question involved therein, and this although if the parties to the litigation were reversed this Court *could* refuse to *give* such

chance to defendant in error, and therefore we submit the proceeding herein in this Court is not *due process of law*, for the same reasons before urged against power in Congress to confer such discriminative power on this Court as attempted by said Section 6.

And we contend that if our objection to the jurisdiction sought to be exercised herein shall be overruled, that by such ruling the claim that this is a government of law for the enforcement of "equal *rights* to all, special *favors* to none under whatsoever pretence sought to be hidden," will be ignored and utterly wiped out and the principles established by the many cases before referred to ignored and overruled, however silently they may be passed by, and this be proven to be a government in *great part* for the *benefit* of *those* who can *succeed* best in getting *special favors*, without any right whatever thereto in this case, at the cost and expense of defendant in error, and to her damage, merely because this Court *elects* to *favor* plaintiff in error with a trial to which it has not a *right* except as a *favor given* it by this Court, in relation to certain commonplace questions, as to which she would not have had a *right* to such trial in this Court if she had been defeated in the Court of Appeals, nor would the defendant in any other similar case in which similar questions of exactly same magnitude, importance and nature were involved have *right* to a similar trial in this Court.

And of course the objection to the validity of so much of said Section 6, as is claimed to *give* this Court at its *election* jurisdiction in this case, would not be any greater, though perhaps more readily appreciated, if power to grant or refuse *privilege* and *favor* to plaintiff in error to have the record reviewed and the case determined by this Court, had been by that Section 6 lodged in some appointee of both or either House of Congress, or the President, or by commissioners elected or appointed in any other conceivable manner.

All this because it is the effect and practical operation of a statute, rather than the language used to frame it, that is to determine whether it is within the legislative power of Congress so to enact or not, or whether the claimed to be axiomatic

rule of, "equal rights to all, special favors to none," in this government, supposed to be of law and not of special favors, has been by the obnoxious attempt at legislation invaded or not.

SELECTION BY THIS COURT UNDER THE HEREINAFTER COPIED PARAGRAPH OF THE AFORESAID SECTION 6 AS TO WHICH IF ANY OF THE CASES THEREIN MENTIONED IT WILL TAKE JURISDICTION OF, IS EXERCISE OF LEGISLATIVE POWER IN CONFLICT WITH THE CONSTITUTION.

Third. In addition to the foregoing reasons why this Court has not jurisdiction of this case, there is still another and greater reason, because by the Constitution the powers intrusted to the government are divided into three departments, executive, legislative and judicial, with certain *specified* exceptions, which exceptions mark the limits of each respectively.

Kilbourne vs. Thompson, 103 U. S., 190–1.
Constitution U. S., Articles 1, 2 and 3.

The matter of creating Courts and giving them jurisdiction is in this country exercise of legislative power, and none other, is a truism that we assume none will either deny or in any manner question—such legislative, or in other words law making power, may and can only be in this country exercised either in and by creating a Constitution, which is but the highest or ranking law, or by enacting statutes or laws by the legislative power or department of government within the limit of power conferred on, or given thereto.

And our claim and contention that power to exercise the functions of either one of the three cannot be by statute conferred on either of the other of those three great departments of government is too well and firmly established to require citation of authorities to sustain, or to be either ignored, silently passed by or overruled, howsoever often they may have been successfully either *evaded* or *trampled* under foot, (see meaning of last paragraph on page 191 of 103 U. S. in opinion of this Court).

And that Congress, by the paragraph in the aforesaid Section 6 (26 U. S. S. 828), which reads as follows:

"And excepting also that in any such case as is hereinbefore made final in the Circuit Court of Appeals *it shall be competent* for the Supreme Court to require, by certiorari or otherwise, any such case to be certified to the Supreme Court for its review and determination with the same power and authority in the case as if it had been carried by appeal or writ of error to the Supreme Court."

[If that paragraph is not for reasons before urged void as to this case, and similar cases,] attempted to transfer to, and endow this Court with, so much of the power of Congress to legislate as to which, if any of such cases as in said paragraph mentioned might be reviewed or determined in or by this Court, not requiring any thereof to be so reviewed or determined in or by this Court, even though such review should be applied for by the parties interested, or any thereof, but to exercise such attempted to be given legislative power by granting such special favors, as before mentioned, as this Court might from time to time, as thus favored suitors might apply, see fit to thus legislate in favor of, and declare this Court would exercise jurisdiction over, or as to the records and cases in or by which they are interested or their interests affected, is, we contend, clear and certain, although by the language used sought to be disguised and passed off as exercise of a judicial function, and if we are wrong in that, then it follows that *right* to have this case reviewed or to review the same or the record herein, or to determine the case in or by this Court has not been pretended or attempted to be conferred or given by legislative power, or by any attempt at or pretended exercise of legislative power, and therefore as *said attempt* to give this Court such, or any, legislative power is void, said paragraph is void, at least so far as this and any similar case is concerned or thereby affected, and this Court without jurisdiction herein, and therefore we ask that this case be dismissed from this Court for want of jurisdiction in this Court to review the record herein or to determine the case.

Fourth. And if by any sophistical argument or contention it shall be urged that by said copied paragraph Congress gave to *every defeated party*, in any court of appeals, a *right* to have the record reviewed and the case determined in and by this Court, then as against any such argument or contention, we refer to the numerous rulings and decisions of this Court in effect and operation to the contrary, and also to the evident intention of Congress shown by the passage of the act of which that paragraph is a part, as well as to the plain reading and meaning of that paragraph, which is to the contrary and square in the face of and opposing to any such argument or contention.

And further, if this Court overrules our objections to the exercise of jurisdiction herein, we contend it will, by so doing, overrule all the decisions heretofore made to the effect either that one of the three great departments of government cannot exercise the powers of either of the others; or, that a party cannot be deprived of property without due process of law; or, that this is a government of law in which all have equal rights, and in which special favors cannot be granted to any by exercise of power by the courts.

There is not any question but that the Circuit Court of the United States for the District of Kansas had jurisdiction to try the case and render the judgment plaintiff in error complains of, and even if there was, still the making of such question would not give this Court jurisdiction to investigate any other question.

And all of the questions hitherto made in this case in this Court by plaintiff in error, or by its assignments of error, are merely as to whether the said trial court did or did not at the trial err in rulings by it made in relation to matters that did not in any manner affect or refer to its jurisdiction in the case; that such questions as are presented by plaintiff in error in this case could not at common law be considered by a reviewing court on certiorari proceedings, is shown by the following authorities:

Doolittle v. Galena and Chicago Union R. Co., 14 Ills. 381, 383.

Hauser and another v. the State of Wisconsin, 33 Wis. 678.
Williamson v. Carnan, 1 Gill and Johnson, 197.
Healy v. Kneeland, 4th N. W. Rep. 200, 202; s. c. 48 Wis. 497.
Commonwealth v. James, 21 Atlantic, 805 (Pa.); s. c. 142 Pa. St. 32.
State ex rel Teasdale v. Smith et al., 14 S. W. Rep. 108; s. c. 101 Mo. 174.
Monreal v. Bush, 46 Cal. 80.
Deer v. Highway Com'rs., 109 Ills. 379, 383.
Hamilton v. Harwood, 113 Ills. 154.
4th Ency. of Pl. and Pr. 254, etc. (title, Certiorari, 3, extent of review.)

POINTS.

OBJECTIONS TO THE SUFFICIENCY OF THE RECORD.

We have hitherto objected, and still object, to that part and so much of the printed volume, which consists of 2,033 printed pages, called the record in this case, which is between the side paging or figures 221 on page 129 thereof, and the side paging or figures 206 on page 1927 thereof, consisting of about 1,798 printed pages, being for any purpose whatever considered as part of the record herein, and submit that it ought not to be. It does not purport on its face, or by the entitling thereof, or any file mark thereon, to be a bill of exceptions taken in the case No. 3149 in said trial Court, in which plaintiff in error was defendant, and the complained of judgment was rendered, or to be a bill of exceptions taken in any case in or to which plaintiff in error was a party, but, on the contrary, in a case in and to which it was not a party (r. 129, 1927); and further, it is not shown by the record to be a copy of any original actually existing document or bill of exceptions in any case, but, on the contrary, is affirmatively shown, as to an important and particular part thereof, not to

Please insert the following next after the list of cases on page 62 of the brief for the respondent in case No. 94, October term, 1902, to wit:

And in addition to the foregoing we contend that any claim or argument—to the effect that jurisdiction can be here maintained in this or in any similar common-law case, tried by a jury, because of, or on grounds similar or equivalent to reasons for which an injunction or other relief is sometimes granted by courts of equitable or other extraordinary jurisdiction, as well as exercise or maintenance of such jurisdiction herein because of any supposed discretionary power,—is in conflict with the seventh amendment to the Constitution.

And we also contend that the seventh amendment prohibits re-examination by a court of review of the record of any such common-law case as this, tried by a jury, otherwise than on a writ of error, or its equivalent, obtainable as a matter of right by any person claiming to be aggrieved.

And as to questions of *magnitude*, *importance* or *general interest* it is only for the law-making power to determine, and to maintain jurisdiction for any of such supposed reasons, is, we contend, to legislate, this because Congress—the law-making power—has not enacted that either *magnitude* or *importance of*, or *general interest in*, any question shall be ground of jurisdiction in this court to review any such case as mentioned in the referred to part of said section 6,—and as it has not, it is not important to consider whether any such supposed grounds of jurisdiction would be maintainable,—and further for Congress to attempt to give jurisdiction on any such supposed ground would also be subject to our contention against said quoted part of section 6, for many reasons, including that if jurisdiction could be or have been as a matter of right for any of such reasons given or maintained in this case to review the record and consider the several assignments of error herein, then, there will probably no case be ever decided by any court of appeals wherein such reasons would not be equally applicable as in this case.

Also on page 36 please change 1222–3, to 1232.

copy of any known bill of exceptions or of any known
g; and as to the remainder, or parts thereof, not thus
natively shown not to be a copy of any known thing, it
ft without being in any manner authenticated as a copy
ıything.

On the 11th day of May, 1900, a writ of error was issued
of the Circuit Court of Appeals for the Eighth Circuit,
cted to said Circuit Court for the District of Kansas, in
tance and effect commanding it to send to said Court of
eals the record and proceedings in the aforesaid case
3149, in which defendant in error was plaintiff, and
ntiff in error was the sole and only defendant (r. 2); but
before the return of that writ of error, and on the 7th of
e, 1900, one of the judges of said Circuit Court of Appeals,
ne instance and request, and on motion of plaintiff in error,
le such an order, as shown at record 2012–13, which is an
er in substance and effect permitting the plaintiff in error
ıave its case submitted and heard upon a bill of excep-
s claimed to have been allowed in another case, in which
defendant in error was a party, but to which the plaintiff
rror was not a party, upon the alleged ground that a bill
exceptions had been allowed in each of said cases, and
t said bills of exceptions were identical. At the time this
er was made neither of said alleged bills of exceptions
been filed in the said Court of Appeals and no return to
writ of error had been made, and the finding of the judge
king said order was not based upon an inspection or com-
ison of any records in his court.

Section 305 of the Code of Civil Procedure of the State of
nsas, G. S. of Kansas, 1868, page 687, in force when and
r since said action was commenced, is as follows:

"Sec. 305. Exceptions taken to the decision of any court
ecord may, by leave of such court, be withdrawn from the
s by the party taking the same, at any time before pro-
dings in error are commenced."

And because of Section 914, R. S. 1878, and other acts
l statutes of Congress, said copied section 305 became and

was applicable to this case and to the matter of said order of June 7, 1900.

Smith vs. Cockrill, 6 Wallace, 756.

And we submit that notwithstanding whatever other force or effect that order has (if any), it, together with the motion of plaintiff in error on and in pursuance of which it (said order), as thereby shown was made, amounts in substance and effect to a withdrawal from the record and proceedings in said case No. 3149, wherein plaintiff in error was a party and sole defendant, by plaintiff in error with leave of court of any such bill of exceptions (if any there really was), in said order mentioned, as had been signed, settled or allowed in or by any judge of the Circuit Court for the District of Kansas in that case, and that from thenceforth the whole matter, record and case stands and should be considered and treated the same as though there had not ever been, in that case No. 3149, any such bill of exceptions ever signed, settled or allowed by that last named court or by any judge thereof.

And the Clerk thereof, after said order of June 7, 1900, had been so made, sent and returned with said writ of error a transcript of certain parts of the record and proceedings in that court in said case No. 3149, consisting of and constituting 304 typewritten pages, as therein numbered consecutively from 1 to 304, which transcript did not include said objected to part of said volume, and there is not in the record herein, or in said volume, anything which shows that said objected to part of said printed volume was sent or returned to said Court of Appeals with said writ of error, or with or as part of said partial transcript or at all.

And an examination and consideration of that printed volume of 2,033 pages, and of the affidavit of John D. Jordan, Clerk of that Court of Appeals, filed herein on the 18th of November, A. D. 1901—even an examination of that volume irrespective of said affidavit—shows that George F. Sharritt, the clerk of the trial court, did not by his certificate appearing at record 2007, certify to any transcript which contains such objected to matter, and further, said certificate of said Sharritt (r. 2007) itself, by the *exception* therein made,

shows that he excluded therefrom, and did not pretend to thereby certify to, that part of the aforesaid printed volume consisting of said objected to 1798 pages, or that anything whatever was a copy of any bill of exceptions in any case, or that it, said interpolated part of said printed volume, was a copy of anything whatever; and further, there is not in said printed volume, called the record herein, any certificate of the clerk of that trial court which shows or certifies, or pretends to show or certify, that said interpolated part—that is, said 1798 pages—is or ever was a copy of any bill of exceptions. And in this connection we refer to the affidavit of said George F. Sharritt, clerk of said trial court, filed herein on the 18th day of November, A. D. 1901, which shows that the name The Mutual Life Insurance Company of New York is in the *only* bill of exceptions filed in said case No. 3147 in said Circuit Court in A. D. 1900, or within several years before that time or since then (other than certain exceptions taken on behalf of defendant in error of date of 2d of April, A. D. 1901), in the place therein which corresponds to where the name of plaintiff in error appears on page 1926 of said volume, but and said Sharritt, clerk of that trial court, has not, and does not, in or by that affidavit, or in or by any certificate or otherwise by anything shown in or by the record, state or certify that said interpolated part of said printed volume is a copy of either the bill of exceptions in his said affidavit mentioned, or of any bill of exceptions ever filed, made, taken, signed or allowed in or by said trial court or by any judge thereof.

And we submit that said Circuit Court of Appeals did not on said 7th day of June, 1900, before the return of said writ of error and such transcript as aforesaid, have power or jurisdiction under or because of Section 921 R. S. 1878 or of any law, to investigate, find or determine whether any such two supposed bills of exceptions as mentioned in its said order of that date had even been signed or allowed or were indentical or not, but and that whether it did or not, that it did not then or ever have jurisdiction or power to *substitute* as, for or in place of any bill of exceptions in said case No. 3149, a supposed copy of a bill of exceptions made, signed,

settled or allowed by any judge or court in any other case, or the objected to part of said printed volume, and that any attempt so to do, whenever or however made, is and always was, utterly void and inoperative, and not binding or obligatory on or as against defendant in error.

And further, if because of said order of June 7, 1900, this Court shall hold that there were two such *identical* bills of exceptions as therein mentioned, still it is not by that order or otherwise shown that said objected to part of said printed volume is a copy thereof, or of either thereof; said order was made on the 7th of June, 1900, long before the certificate to said transcript was dated on the 20th day of June, 1900, (r. 2007) and long before that transcript consisting of such 304 consecutively numbered typewritten pages, was on the 2nd of July, 1900, filed in said Court of Appeals (r. 2007.)

And we submit there is not any reason shown why said interpolated part of said volume should have been printed, placed and interpolated in said printed volume between two separated and dismembered parts of said 304 consecutively numbered typewritten pages, which constituted the transcript so as aforesaid returned with said writ of error to said Court of Appeals, if that transcript had been printed as returned altogether, without such dismemberment and separation thereof, as it should have been, then even if said objected to part of said volume had also been printed by itself, whether both were placed in one cover or not, our objections would be at once and thereby made manifest and plain; and we submit plaintiff in error should not be benefited or have advantage because a transcript has been separated into different parts, and such objected to part of said volume printed or placed between the severed parts of the said transcript.

And further, by reference to said pages 129 and 1927 and said order of June 7th, 1900, it will be seen that if both supposed bills of exceptions in that order mentioned *were identical*, that then *both* were taken in the case of defendant in error against the Mutual Life Insurance Company of New York, case No. 3147, in the trial court.

And thus it stands and is made to appear that if two such *identical* bills of exceptions actually exist, they were both taken

and entitled in that last named case, and from said affidavit of George F. Sharritt, it further appears that plaintiff in error was not named in either thereof, if there were two, and both were *identical* at a place corresponding to where its name appears on said page 1926, and if we are not correct in this, *then* we submit there were not two *identical* bills of exceptions.

And further, if the finding of the judge of the Court of Appeals, to the effect that there were two such bills of exceptions as he found were *identical*, shall be sustained, then on consideration of the affidavit of Sharritt, clerk of the Circuit Court for the District of Kansas, it is certain that the name of plaintiff in error *does not* appear in either thereof at the place *corresponding to that where* the name of plaintiff in error appears on page 1926 of said printed volume, but *that on the contrary* the name of the Mutual Life Insurance Company of New York is in such corresponding place in each thereof.

And as such difference in name is very material and important and goes to the question as to on whose behalf any such bill of exceptions was made, signed, settled or allowed, as well as to whom leave was given and time extended, as indicated on said page 1926, it follows that no such bill of exceptions, certainly not the one in case No. 3147, which, as we understand, plaintiff in error seeks to have said objected to part of said printed volume treated as a copy of, was prepared, made, signed, settled or allowed by, for or at the request of plaintiff in error, or that leave was given or time extended for it so to do or have done for it, and such variance being shown in such important matter as of the name of the party who prepared and as to whom such leave was given and time extended and for whom the bill of exceptions in said case No. 3147 was signed, settled and allowed, an unauthorized change amounting, if intentionally done, to a crime, is shown, which in addition to showing that plaintiff in error was not the party by or for whom the same was prepared, signed, settled or allowed, or to whom such leave was given or time extended, also discredits the whole document, that is, all of said objected to part of said printed vol-

ume, and is cause sufficient to, and requiring, according to the rules of law relating to altered or false instruments and records, and copies thereof, that all of said objected to part of said printed volume be disregarded and not considered for any purpose.

And further, in this connection, we refer to the case of U. S. v. Jones, 149 U. S. 262.

Which case shows the law to be that as there is nothing in the record showing *time* was extended or given to plaintiff in error to take, submit, prepare, have settled, or allowed any bill of exceptions in said case to which it was not a party, that is, in case No. 3147, outside of said objected to part of the pretended record, it follows that said objected to part cannot be considered, used or referred to herein as part of the record, and on this subject we refer to the order of Court of 20th November, 1899, at record 120-1, which is the only order of the trial court shown in the record relating to any bill of exceptions and that was limited to a bill of exceptions in case No. 3149, and the exceptions of defendant in error, set forth at record 125 to 128, which do not relate to any bill of exceptions taken in case No. 3147, but and the same shows that defendant in error did not consent to such bill of exceptions if any as was actually signed in case No. 3149, notwithstanding anything said at record 1926-7. The June term, 1899, of the trial court ended before the November term thereof, 1899, all before any bill of exceptions was signed.

And here let us as and for an object illustration of our argument sever said printed volume at first into three parts, making the first point of severance at the end of the 205th side paging thereof, where said figures 221 appear and commence on said page 129, the second point of severance at the place where the figures 206 commence on page 1927 thereof, and then lay the objected to part of said volume aside, and put what is before and after that objected to part together, and then we will have as it should be and should have been printed, a printed copy of the aforesaid transcript as it came from the Circuit Court for the District of Kansas, consisting of 304 consecutively numbered typewritten pages once more

together, and then it will without necessity of argument be apparent that nothing therein, neither any of the recitals or certificate of Sharitt, clerk, or filing endorsement of Jordan, clerk (r. 2,007) have any reference whatever to the objected to part of said volume, said 1798 pages thereof, thus discarded and taken from a place where it has improperly intruded, and it will also then be apparent that said order of June 7, 1900, does not in any manner identify or authenticate said objected to part of said volume as, or to be, a copy of any supposed bill of exceptions in that order mentioned, or of anything, and it will then also on inspection of the then two parts of what is now said volume be without necessity of argument or further illustration apparent beyond contradiction that said objected to part, said 1798 pages, is a mere *waif*, not in any manner authenticated as or shown to be a copy of any bill of exceptions ever signed, settled or allowed, but and on the contrary because of the aforesaid affidavit of Sharitt, clerk, it will be apparent and certain that whoever got up or framed any original of that objected to part, said 1798 pages, inserted the name of plaintiff in error where it appears on page 1926 without authority or excuse for so doing, and also that in and as to such important particular as the name of any party at that place that so much of such objected to part, said 1798 pages, as consists of the name of the plaintiff in error as there found, in the connection found, is not a copy of any bill of exceptions ever signed or allowed in the case in which it is entitled record 129, or filed record 1927, said case No. 3147 in the trial court, and further as said affidavit does not speak as to other parts of the bill of exceptions filed in said case No. 3147, said 1798 pages is not, as to any part thereof, thereby shown to be a copy of any bill of exceptions or of any part of any bill of exceptions ever filed in that case No. 3147, and thus it is apparent and affirmatively shown that said objected to part, said 1798 pages, is not only a mere waif, but is at least false and counterfeit as to an important part, and being so as to such part, it follows that it is under such grave suspicion as to the other parts thereof, that the rules of law and custom in relation to authentication of copies of records should not be overridden and disregarded for the purpose of

permitting plaintiff in error to have hearing on or as to said 1798 waif pages thus discredited, no matter who caused the same to be printed or intruded where found, or why it was so done, and it should be borne in mind that said Sharitt does not by his affidavit contradict any certificate of his found in said printed volume.

And further, it is apparent and certain that the trial court did not ever give plaintiff in error time or leave to file or prepare a bill of exceptions in said case No. 3147, and that there did not any judge thereof ever settle, allow or sign any bill of exceptions for or on behalf of plaintiff in error, in said case No. 3147, in which case said objected to part purports on its face to have been made, and in or to which case plaintiff in error was not a party. (R. 129, 1927).

And further, the trial court or the judge thereof or any Court or judge did not either pretend to, or ever have power or jurisdiction to allow, settle or sign any bill of exceptions for plaintiff in error in said case No. 3147, in or to which case it was not a party.

And further, we submit that the Circuit Court of Appeals ought to have disregarded said objected to part of said printed volume, but as it rendered such judgment of affirmance as it ought to have done if it had disregarded the same, it is not as to this question important to consider why it affirmed the judgment of the trial court complained of.

Sullivan vs. Iron Silver Mining Co., 143 U. S. 431.

And we ask that our objections to said objected to part of said printed volume be sustained, and if they be, then we submit that it follows that this Court ought to affirm the judgments complained of, as the several assignments of error are based on what is supposed to be found in said objected to part of said volume.

PRELIMINARY OBJECTIONS TO THIS COURT CONSIDERING ANY OF THE SEVERAL ASSIGNMENTS OF ERROR WHICH RELATE TO ANY OF THE INSTRUCTIONS WHICH THE COURT REFUSED TO GIVE TO THE JURY, OR TO ANY PART OF THE CHARGE BY THE COURT GIVEN TO THE JURY.

Assignments of error Nos. 85, 86, 87, 88, 89, 90, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106 and 107, set forth at record 1996 to 2007, relate to the refusal of the Court to give certain instructions asked by plaintiff in error, and assignments of error Nos. 91 and 92 (r. 1999, 2000) relate to parts of the charge of the Court given to the jury.

At the conclusion of the arguments to the jury, and before the Court had charged the jury, plaintiff in error requested the Court to give to the jury (r. 1904) a large number of instructions, including, as shown at record 1904 to 1915, paragraphs or subdivisions thereof numbered 1, 7, 9, 10, 11, 12, 13, 14, 18, 20, 21, 22, 23, 25, 26, 27, 28, 31, 33, 34, 36, 37, 38, 39, 40, 41, 42, 43, 44, 46, 47, 48, set forth at record 1904 to 1915. What the missing 2d to 6th, 19th, 24th, 29th, 30th, 32d, 35th and 45th paragraphs thereof, eleven in number, were, unless they were those of such numbers as set forth at record 84 to 94, and unless they were such numbered paragraphs as set forth at record 84 to 94, there is nothing to show that any refused instruction requested by plaintiff in error was signed by it or its attorneys; and unless the same were so signed, that it cannot for that reason, irrespective of any other, be here heard in relation to any refusal of the Court to give any thereof. See—

Morisette vs. Howard, 62 Kansas 463, 468.
R. S. of Congress, 1878, Sec. 914.

And the trial court charged the jury as shown at record 1915 to 1925, and thereby in substance and effect, and practically in language, adopted and gave to the jury as a part of such its charge to them, different parts of some of the instructions the plaintiff in error so requested to be given to the jury, and among other parts thereof the Court included in such charge those parts of Nos. 1 and 28 (r. 1904, 1909)

asked by plaintiff in error, which were to the effect as applicable to the evidence, that the real question in the case (meaning, of course, what was at that time left in controversy) was whether the herein mentioned dead body was the corpse of John W. Hillmon or not, as shown at record 1917, 1918, 1919, 1921. And the Court also in its general charge gave the No. 19 set forth at record 87, as shown at record 1924. Yet plaintiff in error makes its 85th assignment of error, notwithstanding the Court gave a part of the 1st, it requested and so gave the substance of said 19th, which irreconcilably conflicted with the refused part of the 1st.

And certain of the so numbered paragraphs of the instructions so asked by plaintiff in error, were plainly properly refused, including among others No. 1, at record 1904, which except as to the part thereof so given as herein shown, was we submit unquestionably properly refused because of what we hereinafter say in relation to the 85th and 99th assignment of error, and also because it was not proper to single out the matter of teeth to the exclusion of all other marks and methods of identity of the corpse.

Grand Trunk Railway Co. vs. Ives, 144 U. S. 433.

And also including No. 7, record 1905, by which plaintiff in error sought to have the Court usurp and invade the province of the jury and determine itself as matter of law, that a preponderance of the evidence was to the effect that the aforesaid dead body was not the corpse of Hillmon, (this in the face of a large preponderance of the evidence to the effect that it was the dead body of Hillmon, but of course that was not a matter for the Court to determine, as matter of law either one way or the other).

And also including No. 9, record 1905, by which plaintiff in error requests the Court to usurp and invade the province of the jury and determine as matter of law, among other things, that Walters disappeared during March, 1879, whereas the testimony of Charles W. Schott is to the effect and tends to prove that he saw Walters in Kansas City, Mo., long after such intercourse, if any, as Walters ever had with any Hillmon, must have occurred, record 1666, 1670 to 1673, and the

testimony of Arthur Simmons shows that Walters worked for him at Leavenworth, Kan., in May, 1879, long after said dead body had been brought from Barbour County to Lawrence, record 1856 and 1858, 1860, at which Leavenworth, Walters wrote his sister Fannie, record 1795, 1808, and also by which No. 9, record 1905, plaintiff in error further asked the Court to determine as matter of law, that if Hillmon was alive after March, 1879, he had committed murder by killing Walters, who was so shown alive as aforesaid after March, and attempted to swindle the insurance companies, whereas if Hillmon was alive after that time there can be no reasonable account given of his absence, considering the testimony of Schott and Simmons, and the evidence in relation to the identity of the corpse, including the proof referred to in the stating part of this brief to the effect that because of certain marks it was not Walters, and of course it is plain for many reasons that said No. 9 was properly refused.

And also including No. 10, (r. 1905), by which plaintiff in error asked the Court to instruct the jury that the evidence tending to identify the body as that of F. A. Walters, of Fort Madison, Iowa, is not contradicted by any direct evidence in this case, *whilst the contrary was the truth*, because of the evidence referred to in the statement part of this brief, and elsewhere, in relation to the testimony by which the dead body was identified as being that of Hillmon, and not that of Walters, including the testimony of many witnesses referred to, who knew Hillmon in his life time, and saw his corpse, some of them immediately after his death, including several men at Medicine Lodge, and defendant in error and others who saw it at Lawrence, and the testimony of John H. Brown to the effect that he himself accidentally killed Hillmon, and that said dead body was his corpse—and further as shown by the hereinafter part of our brief which relates to the 74th, 75th, 76th, 77th and 84th assignments of error, we submit it is beyond reasonable question that the so-called "Walter's theory" is exceedingly weak and gauzy, but however that may be, it is surely very certain that a great preponderance of the evidence was to the effect that said dead body was not that of Walters, but

whether so or not, it is, we submit, plain and certain that that instruction No. 10 was properly refused.

As to instructions Nos. 11, 12, 13, 14 and 18, we refer to what we hereinafter say in relation to assignments of error No. 93, r. 2000; No. 94, r. 2000; No. 95, r. 2000; 1st No. 96, r. 2001; 2nd No. 96, r. 2001, as plain and sufficient reasons why each of those instructions Nos. 11, 12, 13, 14, 18, were respectively refused.

And also including No. 22, r. 1908, by which plaintiff in error asked the Court to usurp and invade the province of the jury, and determine as matter of law that Brown fled—whereas we submit there was not any evidence that he fled, but whether he did or not was a question only for the jury, and not for the Court to determine, and therefore we submit that said instruction No. 22 was properly refused—all which we further show in the hereinafter part of our brief which relates to the 97th assignment of error.

And also including No. 23, r. 1908, which was an effort to get the Court to whitewash Mr. Buchan, who, as employee of and for plaintiff in error, obtained the statement set forth at record 1284–6 and the release set forth at record 19, 585, in the manner and by tne use of means as shown by the evidence in the case referred to in the statement part of this brief, and in the part hereof relating to assignments of error Nos. 27 to 32, 59 and 105, whereby it is shown among other things by his own evidence, as well as by that of others, that he did, as shown by the evidence do with and by his client John H. Brown, that which should prevent him from being by the Court painted white and dubbed clean and pure, after he had from the insurance companies accepted payment for what he did as so shown, as requested by that instruction No. 23—and therefore we submit it is plain and clear that that No. 23 was properly refused.

And also including No. 25, record 1909; No. 40, record 1913, and No. 43, record 1914, respectively, it is plain that those refused instructions were respectively properly refused; plaintiff in error was then there contending that the aforesaid dead body was not that of Hillmon, and if plaintiff in

error had been correct in claiming the dead body was not that of Hillmon, it follows that the "Munn paper" therein mentioned was part of what would be properly called compounding of a felony; plaintiff in error appreciating that with that "Munn paper," and the testimony in relation thereto, and to the releases and the so-called Brown statement, in evidence, that it was *prima facie* in the position of either having sought to wrongfully deprive defendant in error of the amount due her on its policy sued on or of having, by its representatives, compounded a felony, desired the Court to whitewash it and its representatives, in such manner as would not have been proper to have done by giving those refused instructions. And further, we refer to what we hereinafter say in relation to assignments of error No. 98, and Nos. 31 and 59, and the references to the record there made, from which it will be seen that the so-called "Munn paper" formed an important link in the chain of evidence connecting plaintiff in error with all that Buchan did at the instigation of plaintiff in error, acting by other representatives thereof, in relation to the matter of procuring the releases, he (Buchan) would not, but for that "Munn paper," as is there shown, have proceeded and got the releases—from all which it is very plain and certain that those refused instructions were respectively properly refused.

And also including No. 28, record 1909, a part of which, that is, so much thereof as was to the effect that the real question in the case was whether the aforesaid dead body was that of Hillmon or not, was given as shown at record 1917–18, 1919, 1921, and as to the other parts thereof we submit the same was properly refused, because the lapse of time therein mentioned was not immaterial matter, but might properly be considered by the jury as shown by the cases of—

Davis vs. Briggs, 97 U. S. 628, 634 to 636.

Whitely vs. E. S. S., 39 N. W. 369, and cases therein cited.

1st Greenleaf on Ev., Sec. 41 and notes.

And we submit it is plain that that No. 28 was properly refused, except as to the part thereof adopted and given in the charge of the Court.

And also including No. 31, record 1910, and we submit it is plain and certain that that No. 31 was plainly properly refused because of what we say hereinafter in relation to the 86th assignment of error.

And also including No. 33, record 1910, it is plain and certain that that No. 33 was properly refused, as it contained a statement which was not true, because by testimony set forth at record 151, it is shown that defendant in error had married since the commencement of the action, and that testimony was not in any manner contradicted.

And also including No. 34, record 1910, considering the evidence in the case, we submit it is very plain and certain that the Court properly refused that No. 34.

And also including Nos. 36, 37, 38, record 1911–12, and No. 47, record 1915, we refer to what we hereinafter say in relation to assignments of error Nos. 64 to 73, Nos. 87 to 92 and No. 106, and submit that those refused instructions Nos. 36, 37, 38, 46 and 47 were properly refused, and in this connection we also refer to what we say in relation to those referred to assignments of error in relation to the parts of the charge copied in assignments of error Nos. 91 and 92, and submit that it is certain that those parts of the charge were properly given.

And in this connection we request further attention to said refused instruction No. 47, record 1915, and to the fact that thereby plaintiff in error asked the Court to instruct the jury to the effect that if they believed from the evidence that the issuance of the policy by plaintiff in error upon the life of John W. Hillmon was fraudulently procured by said Hillmon alone, or by said Hillmon confederating and conspiring with Levi Baldwin and John H. Brown, then such policy is absolutely null and void, and that they should find for plaintiff in error, without therein specifying what would be such fraudulently conspiring or confederation, but leaving it to the jury to imagine whatever they chose to imagine, as being enough to constitute such fraud, confederation and conspiring, in other words by that instruction plaintiff in error requests the Court to tell the jury in substance and

effect to find a verdict for plaintiff in error if they wished to, and in view of the authorities hereinafter referred to in reference to what must be stated in a pleading to constitute cause for setting aside a written instrument as having been fraudulently obtained and of the proof necessary to sustain the required allegations in such a pleading, we submit that said refused instruction No. 47 was asked without any excuse for so doing, and that it is plain it was properly refused, no matter whether we are right with reference to any other question herein argued in relation to conspiracy and fraud or not.

And also including refused instruction No. 44 in relation to which we refer the Court to what we hereinafter say in relation to assignment of error No. 105.

And after the Court had charged the jury, as shown at record 1916 to 1925, plaintiff in error in the presence of the jury and before the jury had retired, as shown at record 1925, did as shown by that part of record 1926, which is as follows:

"The foregoing exception was taken at the time mentioned by Mr. Barker, of counsel for defendants, in the following language:

"We except to what you say on the subject of conspiracy. He also stated: "We except to the refusal to give the instructions which we requested."

"This was all that was said by counsel upon the subject of exceptions to the instructions requested and charge given."

—and from that copied part of record 1926, we contend that it is thereby clearly and fully shown that plaintiff in error did not, then or at any proper time, take any exception to the refusal of the Court to give the several instructions copied at record 1904 to 1915, or to any of the instructions mentioned in any of the assignments of error other than one single and general exception to the refusal of the Court to give all of the instructions copied at record 1904 to 1915, and that such exception was only a general one to the whole number of instructions which plaintiff in error, as shown, requested the Court to give to the jury, and that

such exception was to the whole thereof as a unit; that transaction shown by the copied part of record 1926, took place on the 18th day of November, 1899, the day when the jury were instructed by the Court and retired to consider of their verdict, and afterwards came into open Court with their verdict, as shown at record 117, 118.

And by the said copied part of record 1926, it is also made plain and certain that plaintiff in error did not, at that time, or at any proper time, except to any part of the charge so given by the Court to the jury other than to all thereof *as a unit*, which was on the subject of conspiracy.

But notwithstanding it is so made plain and certain that plaintiff in error did not, then on the 18th day of November, 1899, except to the refusal of the Court to give the above mentioned paragraphs or numbered instructions set forth at record 1904 to 1915, separately, as to any or either thereof respectively, yet when afterwards, about 135 days thereafter, and on the 2nd day of April, 1900, that which purports to be a bill of exceptions in the record was signed as shown at record 1927, there was placed therein next after and at the end of each respectively of the aforesaid several numbered paragraphs, instructions, an exception as though it had been by plaintiff in error and the Mutual Life Insurance Company, respectively, taken to each so numbered paragraph or instruction separately and respectively, at the time of the trial and before the jury so retired on the 18th of November, 1899.

An exception was also then to-wit: on the 2nd of April, 1900, allowed to be placed in such supposed bill of exceptions as to separate paragraphs of so much of the charge of the Court on the subject of conspiracy as is set forth and shown at record 1925, 1926, although the copied parts of the charge of the Court on the subject of conspiracy set forth at record 1925 and 1926, and referred to in assignments of error Nos. 91 and 92, was not all of the charge of the Court on the subject of conspiracy. More on that subject of conspiracy in the charge of the Court will be found by looking at record 1916, 1917, 1920, and also at

record 1921, and it is plain and certain that the Court did not as against plaintiff in error, err by anything it said on the subject of conspiracy in those parts of its charge on the subject of conspiracy not copied at record 1925–6.

And we also contend that it is at least certain and plain beyond controversy, that the Court did not err in or by refusing to give some of the above mentioned and numbered paragraphs or instructions asked by plaintiff in error — and if we are right in that, we contend it follows that plaintiff in error can not now here be heard to complain of the refusal of the Court to give any instruction by it or by it and the Mutual Life Insurance Company requested to be given to the jury, or that the Court erred in charging the jury as it did on the subject of conspiracy or on any subject whatever.

In this connection we request attention of the Court to the well settled rules of law in relation to construction of statutes, records and written instruments, to the effect that if the same conflict in different parts thereof, that which is said last therein controls, and that anything preceding which conflicts therewith must give way thereto, from which, as applied to this case, it is made plain and certain that the exceptions in relation to separate and different parts of the charge given by the Court, as shown at record 1925, 1926, were not taken at the proper time or when or before the jury retired, nor at all until long after the verdict was found and the judgment complained of was rendered thereon, nor until the 2d day of April, A. D. 1900; and also, that the several exceptions set forth at record 1904 to 1915, both inclusive, were not any of them taken until the last mentioned day, to-wit: on the 2d of April, 1900—long after the trial and long after the verdict and judgment had been rendered.

And further, we submit that by said copied part of record 1926, the judge of the trial court in substance says: That notwithstanding anything before stated, there was not any such exception taken by plaintiff in error, or either of the insurance companies, to the refusal of the Court to give instructions asked, or any thereof, or to any part of the charge

given to the jury, otherwise or further than as shown by this said copied part of record 1926, but—and I leave herein the hereinbefore written statements about exceptions on those subjects as thus qualified and in effect by me cancelled and struck out—lest whatever court may review the proceedings herein shall be of opinion that, because of what is shown by this copied part of record 1926, such before written statements about exceptions ought to be allowed to remain where they are, and therefore I state the facts and leave the effect thereof to be determined by such court of review.

And we contend that the record should be construed and interpreted and considered the same, and with like effect in all respects and as to every question involved, as though none of the exceptions found between record 1904 and the commencement of the above copied part of record 1926 were ever taken, made or allowed in any manner whatever, and from that, inasmuch as at least some parts of the charge of the court on the subject of conspiracy was correct, and not such as plaintiff in error could complain of (we claim all thereof was correct); and also, inasmuch as some of the aforesaid numbered instructions and paragraphs requested by plaintiff in error to be given to the jury were properly refused, and that the Court would have erred if it had given all thereof, it follows that plaintiff in error cannot now here be heard to complain thereof, or on or as to whether the Court erred in charging the jury as it did, or in or by refusing to give to the jury any instruction, or any part of any instruction, whatever.

And that such is the situation now here, we refer to the following cases:

Holloway vs. Durham, 170 U. S. 615.
R. R. Co. vs. Callaghan, 161 U. S. 91.
Thiede vs. Utah Territory, 159 U. S. 520.
Newport N. & M. V. Co. vs. Pace, 158 U. S. 36.
Block vs. Darling, 140 U. S. 235, 238.
Chateaugay Iron Co. vs. Blake, 144 U. S. 476, 487-8.
Rogers vs. The Marshall, 1 Wall. 644.
Bogk vs. Gassert, 149 U. S. 17, 26, and cases cited.

St. Louis, I. M. & S. Ry. Co. vs. Spencer, 71 Federal, 93.
Holder vs. U. S., 150 U. S. 92.

In St. Louis, I. M. & S. Ry. Co. vs. Spencer, 71 Federal, 93-4-5, the Court of Appeals of the Eighth Circuit among other things says:

"If the entire charge of the Court is excepted to, or a series of propositions contained in it are excepted to in gross, and any portion of what is excepted to is sound, the exceptions cannot be sustained, * * * *

"The charge of the Court was concluded and the jury retired to consider their verdict on January 26, 1895. The exceptions now urged to certain specific portions of the charge first appeared in the bill of exceptions, which was presented to and signed by the judge who tried the case on February 23, 1895. These exceptions are utterly futile."

Many other decisions are cited in the last case in support of the rule stated, and we cite the following recent cases from other Courts of Appeals to the same effect:

West. Union T. Co. vs. Baker, 85 Fed. 690.
Columbus C. Co. vs. Crowe Co., 98 Fed. 946.
Parks Bros. vs. Bushnell, 60 Fed. 583.
McCutcheon vs. Hall C. Co., 101 Fed. 546.
Stewart vs. Morris, 96 Fed. 703.
Yates vs. United States, 90 Fed. 57.
Waples vs. Turner, 83 Fed. 64.
Repauno C. Co. vs. Victor H. Co., 101 Fed. 948a.
Pittsburg Ry. Co. vs. Thompson, 82 Fed. 720.

By which as well as by many other cases not cited it is shown that it is established that a general exception to the refusal to give a series of instructions or to one instruction, is unavailing if any one of the whole series, or any part of either is unsound.

The absurdity and impropriety of such general exception to a whole series of forty-eight instructions becomes the more apparent when by analysis we find the several instructions asked to be utterly inconsistent with each other. To

illustrate: In its first instruction (r. 1904) defendant requested the Court to charge that, "In this case the question to be determined is whether the body brought to Lawrence in April, 1879, was the body of John W. Hillmon, etc." And again in its twenty-eighth instruction (r. 1909) it requested the Court to charge: "That the real question in the case is whether or not John W. Hillmon died at the time and in the manner in said petition alleged, that is, from a gunshot wound at the hands of one John H. Brown at Barber County, on the 17th day of March, 1879."

In its general charge the Court substantially adopted these special instructions asked by defendant, saying (r. 1917–18):

"The principal question for your determination, and it may be said to be the crucial question in the cases, is whether John W. Hillmon died as claimed by the plaintiff, in March, 1879, and whether it was his body that was brought to Lawrence, Kansas, in April of that year, etc."

And it further charged the jury to the same effect, as shown at record 1919 and 1921.

And plaintiff in error did not except to the Court so charging the jury.

We submit that said proposition contained in said first and twenty-eighth instructions asked by plaintiff in error was given in a more proper form and in more appropriate language in the general charge of the Court than as asked. It is not available error for the Court to refuse to give even a proper special instruction requested where the same matter is covered by appropriate language in the general charge of the Court.

Western C. & M. Co. vs. Berberich, 94 Fed. 329.

And a special instruction requested, if adopted by the Court and incorporated in its general charge to the jury, cannot be taken advantage of by the party that invited the Court to give it, however erroneous it may be.

Walton vs. Ry. Co., 56 Fed. 1006.

Badgett vs. Johnson, Fife Co., 85 Fed. 408.

Although considering the issues and evidence in the case we submit it is clear the Court did not err in so charging the jury.

And we submit that where a party requests the Court to give a long series of inconsistent special instructions, and the Court has adopted and given to the jury in its general charge, the law as it is claimed to be in one or more of the said special instructions, such party is not relieved from the operation of the above rule, because he also asked the Court to give instructions inconsistent with those asked by him and adopted by the Court. In other words, a party cannot properly concurrently ask the Court to submit a certain question of fact to the jury upon the evidence, and also to instruct the jury that there is no evidence upon the subject or to disregard the same as the plaintiff in error in effect did by its 1st, 28th, 34th, 37th, 38th and 47th special instructions. (R. pages 1904–1915, and other inconsistent instructions asked.)

A general exception to the refusal to give a series of special instructions must necessarily be bad where that series contains four such instructions as the 1st, 28th, 34th, 36th, 37th, 38th and 47th, pointed out above, by some of which, to-wit, the 1st and 28th, the Court was requested to instruct the jury to the effect that the real question in the case was whether the aforesaid dead body was that of Hillmon or not, whilst by others thereof, to-wit, the 38th and 47th, the Court was requested to instruct the jury to the effect that such real question might be ignored and disregarded, and a verdict found for plaintiff in error if they believed the policy had been obtained in pursuance of a conspiracy, or with a fraudulent intent, even though it was not damaged, *whether Hillmon was dead or not*, by which we see that said 1st and 28th instructions irreconcilably conflicted with said 38th and 47th. Of course, it was not proper to give all those in the same case, on the same evidence, under the same pleadings, and others of the instructions asked were also inconsistent with some others that were asked, and of course the Court should not have given inconsistent instructions.

And further, we submit that the conflict between what is stated on the above copied part of record 1926, and what is

previously said between that and record 1904 about exceptions, is accounted for and explained by the improper practice sometimes indulged in of permitting parties to have *such* exceptions preserved in a bill of exceptions prepared after the transactions occurred to which the same relate as they may desire, the Court or judge thereof taking on itself, or himself, the liberty of giving the party the benefit of any exception it may choose to write in a bill of exceptions, no matter how long after the transactions to which it relates occurred, the necessity, propriety, object and purpose of requiring a party to state before the jury retire, exactly what their exceptions relate to, so that the Court can have in fairness to the other party, an opportunity to reconsider and determine whether the exception is well taken or not, is frustrated and rendered of no avail if the exceptions between page 1904 and the above copied part of page 1926 can be here considered, and further, the opposite party in this case, the defendant in error, has and had a right to hear and know exactly what the exceptions were, both to the charge and the instructions refused, so that if she had chosen so to do she could by her counsel at the trial had opportunity to suggest to the Court as to whether it should or should not give any referred to part of the instructions asked or charge given. And we contend that defendant in error had some rights in that respect, as well as plaintiff in error, and that it is not and was not either lawful or just, or right to her, to permit plaintiff in error after the lapse of about 135 days to subdivide the general exceptions to all of the charge of the jury on the subject of conspiracy as a unit referred to in the copied part of record 1926, and scatter the same over and make the same separately applicable to such different parts respectively of the charge of the Court on that subject as plaintiff in error saw fit, or wished to—or to subdivide and apply the general exception shown at record 1926 to the refusal of the Court to give all of the aforesaid requested instructions as a unit, separately to each respectively of those refused instructions, notwithstanding the only exception actually taken at the proper time at the trial was when taken, really only

taken to the refusal of the Court to give all thereof as a unit, as shown at record 1926.

And therefore we contend that the plaintiff in error has not any such exception to the refusal of the Court to give any of the aforesaid instructions or paragraphs of instructions to the jury, or to its having charged the jury as it did in relation to the part of its charge copied in the aforesaid assignments of error Nos. 91 and 92, or either thereof, as will entitle it to be heard in relation to the matter of either or any thereof, or as to whether the Court erred as claimed by plaintiff in error in or by its aforesaid assignments of error Nos. 85 to 107, or any thereof, or as will enable this Court to investigate or determine as to whether the trial court did or did not err as alleged in those several assignments of error or in any thereof, and we ask that the same, those several assignments of error be respectively disregarded, and we make these, the above shown objections, to each of said several assignments of error, instructions, parts of said charge and exceptions respectively, and ask that the same be applied and considered with like effect as though hereinafter repeated in each of such of the following parts of this brief as refers to any of said several assignments of error, or to any of the aforesaid refused instructions, or to the parts of the charge mentioned in said assignments of error Nos. 91 and 92, or either thereof, or to any part of the charge of the Court to the jury, of or to which plaintiff in error may in its brief refer or make complaint or objection — without necessity of further making any such our objections thereto respectively or to any thereof.

BRIEF AND ARGUMENT OF DEFENDANT IN ERROR IN REFERENCE TO THE ASSIGNMENTS OF ERROR OF PLAINTIFF IN ERROR AS NUMBERED BY IT.

If the Court shall overrule our objections to the jurisdiction of the court, and also to hearing the matter of the several assignments of error made by plaintiff in error, then and with reference to the whole case we refer to the opinion of the Circuit Court of Appeals, delivered by the Hon. Amos M. Thayer in deciding this case when it was in that court, shown in the case of

Connecticut Mut. Life Ins. Co. vs. Hillmon, 107 Fed. 834,

at pages 836 to 843, and submit that the same shows sufficient reasons why the judgment of the trial court complained of by plaintiff in error should be affirmed.

ASSIGNMENT OF ERROR No. 1. (R. 1931-2.)

Relating to Motion to Quash the Venire and Discharge the Panel of Jurors.

The evidence in relation to that motion, part of which is set forth at record 130 to 133, was not sufficient to require a sustaining of that motion, and there was not any cause shown why the motion should have been sustained.

And as plaintiff in error *did not exhaust* all of its peremptory challenges, but waived one thereof (r. 137), therefore, as hereinafter argued and shown on the matter of assignments of error 4 to 7 on the subject of challenges to jurors, plaintiff in error *waived* any question raised by that motion, and cannot now be heard in relation thereto.

And further, even if the trial court had erred in overruling that motion it could have proceeded to impanel a jury without issuing any new venire.

ASSIGNMENTS OF ERROR Nos. 2 and 3. (R. 1931–2.)

Relating to Consolidation of Cases for Trial.

By Section 921, R. S. 1878, the Court was given authority to consolidate the two cases for trial.

Insurance Companies vs. Hillmon, 145 U. S. 285, 292–3, which are cases wherein was reversed judgments rendered in 1888, in favor of defendant in error, one against said plaintiff in error, another against The Mutual Life Insurance Company, another against The New York Life Insurance Company, on separate judgments and verdicts against them, on separate writs of error, as shown *id.* 300.

Those reversed judgments were as to plaintiff in error and The Mutual Life Insurance Company on the same causes of action and pleadings on which the two cases were after the disposition and dismissal of the case vs. The New York Life Insurance Company, and on the 9th day of May, 1898, consolidated for trial, as shown at record 66.

The three cases having been at first consolidated for trial in 1882 (r. 25), left so at trial in 1885 (r. 33), left so at trial in 1888 (r. 41), left so at trial in 1895 (r. 43, 44), left so at trial in 1896 (r. 51).

The order of 1898 (r. 66) was by the Court continued in force, and the motion of plaintiff in error to set same aside overruled on 16th October, 1899. (R. 70.(

The agreement made in December, 1897, to set aside the consolidation (r. 135, copied at r. 134), could not control the Court in the matter of consolidation. It was shown to Judge Williams in May, 1898, notwithstanding which he caused the cases to be consolidated, as shown at record 66, which action was confirmed by Judge Hook (r. 70). Whether such cases should be tried separately or consolidated for trial was not matter for the parties to agree about or control, but for the Court to determine according to its discretion.

Insurance Companies vs. Hillmon, 145 U. S. 285, 293.
Toledo, St. L. & K. C. R. Co. vs. Continental Trust Co., 95 Fed. 506.

ASSIGNMENTS OF ERROR Nos. 4, 5, 6 and 7.

(R. 1932–3; 71–2; 136–7.)

Relating to Peremptory Challenging of Jurors.

As shown, the two cases of Mrs. Hillmon, one against the Connecticut Mutual Life Insurance Company, the other against the Mutual Life Insurance Company of New York, were consolidated for trial; the trial judge ruled that each of the defendant insurance companies was entitled to the same number of peremptory challenges as though no consolidation had been made, namely, three each, and that the plaintiff, Mrs. Hillmon, was accordingly entitled to three challenges, because of being plaintiff in each case, that is, six peremptory challenges in all.

The power of the Court to consolidate for trial *cases of a like nature* or *relative to the same question*, does not depend on whether the *same person* is *party* in the different actions.

That each *party* on each side of *each* case consolidated for trial is entitled to three peremptory challenges under Sec. 819, R. S. 1878, is, we submit, established by said case in 145 U. S. 285, 293–4—and that whether the *same* person is plaintiff or defendant in two or more of the cases or not is immaterial. The question of *persons—individuals*, is not to be considered on such matter, because the party, plaintiff or defendant in the meaning of that Sec. 819, may consist of but one or of fifty persons or individuals; if of fifty, they are still but *one party* for the purposes of challenging within the express terms of that section. And the party, no matter of how many persons composed, plaintiff and defendant in each case, is to be deemed a single party for the purpose of challenges under that section *merely* because of being *such* party. Sallie E. Hillmon was plaintiff in two cases consolidated. If John Doe had been plaintiff in the case against the Mutual Life Insurance Company, he would have been entitled to three such challenges as well as Sallie E. Hillmon as plaintiff in the other case; this because he would have been deemed a party for purposes of challenges under Sec. 819. And we submit that defendant in error was entitled to six peremptory

challenges, same as two different plaintiffs would have been if some other person had been plaintiff in one of the cases; this because the plaintiff in *each* of the two consolidated cases was entitled to three challenges because of being plaintiff in either, making six. We submit the cases cited by plaintiff in error on this point are not at all applicable to this case. If we are not right in this connection, then it follows that under said Secs. 819 and 921 the parties defendant are to be favored because of the consolidation.

Surely the cases when consolidated for trial were not merely *one* case for purposes of peremptory challenges *by the plaintiff therein only.*

They were separate for purposes of verdict, judgment, writs of error and exceptions, and also for purposes of peremptory challenges of jurymen by defendants in each case respectively.

Insurance Companies vs. Hillmon, 145 U. S. 285, 300.
Toledo, St. L. & K. C. Co. vs. Continental Trust Co., 95 Fed. 506.

From which it follows that defendant in error was entitled to three peremptory challenges because of being plaintiff in each case respectively, six in all.

The ruling of the trial judge giving the plaintiff six peremptory challenges, so far as we can learn, is in accordance with the rulings of the Circuit Courts generally, since the decision in the case of Insurance Company vs. Hillmon, 145 U. S. 285, but if the trial court was in error in holding that the plaintiff was entitled to six peremptory challenges such error was harmless and no ground for reversal, because there is no complaint or ground for complaint that the jury was not a fair and impartial one.

2d Objections to Jury Waived.

And further, we submit that plaintiff in error waived the matter of those assignments of error in relation to peremptory challenges of jurors by voluntarily accepting the jury as it was finally empanelled by not exercising its third peremptory right of challenge.

The attention of the Court is called to the fact that the Connecticut Mutual Life Insurance Company did not exercise its three peremptory challenges. (R. 136, 137.) It accepted the twelve men in the box when it still had the right to challenge peremptorily any juror that was unsatisfactory to it. (R. 137.)

After the jury were all in the box, the plaintiff in error still had, but waived a peremptory challenge, and thereby accepted the twelve men in the box; this was tantamount to a waiver of all objections to any thereof.

F. E. D. & W. V. Rld. Co. vs. Ward, 29 Kans. 354.

There is a wide difference between overruling a challenge that a party is entitled to and sustaining a challenge that a party is not entitled to, and it is generally held that it is not substantial error to excuse a juror upon a challenge based upon insufficient grounds where an unexceptionable jury has been obtained, and especially where the complaining party has not exhausted his peremptory challenges.

Stout vs. Hyatt, 13 Kans. 232, 241.
A. T. & S. F. Rld. Co. vs. Franklin, 23 Kans. 74.

And the above rule has been substantially applied by this Court in the case of Hayes vs. Missouri, 120 U. S. 68, 71, where it is said:

"The accused cannot complain if he is still tried by an impartial jury; he can demand nothing more. (Northern Pacific Rld. Co. vs. Herbert, 116 U. S. 642.) The right of challenge is the right to reject, not to select a juror. If from those who remain an impartial jury is obtained, the constitutional right of the accused is maintained. In this case it is not even suggested that the jury by which the accused was tried was not a competent and impartial one. He was allowed twenty peremptory challenges and it does not appear that he exhausted them."

And again in the case of Hopt vs. Utah, 120 U. S. 430, it is said by this Court:

"When a challenge by a defendant in a criminal action to a juror, for bias, actual or implied, is disallowed, and the juror is thereupon peremptorily challenged by the defendant, and excused, and an impartial and competent juror is obtained in his place, no injury is done the defendant, if until the jury is completed, he has other peremptory challenges which he can use."

And in Spies vs. Illinois, 123 U. S. 131, 168, the preceding cases quoted from above were referred to and the doctrine announced therein, approved and applied.

ASSIGNMENT OF ERROR No. 8. (R. 1933.)

Relating to Motion to Discharge Jury.

What we have said in relation to assignments of error Nos. 1 to 7 is also applicable and a sufficient answer to this.

ASSIGNMENT OF ERROR No. 9. (R. 1933.)

Relating to Challenge of Juror.

On the matter of overruling a challenge againt P. Botkin, called as a juryman, he was not one of the jurors finally impanelled to try the case (r. 72). Each of the different parties, plaintiff and defendant, challenged some jurors peremptorily; whether defendant in error challenged Botkin or not in using one of her first three peremptory challenges mentioned at record 136 is not shown. If we remember right, she did. It is not shown that the plaintiff in error or the Mutual life Insurance Company, either of them, peremptorily challenged Botkin, therefore it is not shown that plaintiff in error was injured by the overruling of that challenge.

But even if it had peremptorily challenged Botkin, still all question as to his fitness was *waived* and *abandoned* by plaintiff in error because both it and the other insurance company respectively waived their respective third and last peremptory challenge, as shown at record 137 and 136, and as though here repeated, we refer to what we have said

about *waiving* in relation to assignments of error 1 to 8, as though here repeated in relation to the Botkin matter.

And further, we submit the evidence did not show cause to sustain the challenge to Botkin (r. 135), and further, as to all which, see also—

Thiede vs. Utah Territory, 159 U. S. 515–16.

ASSIGNMENT OF ERROR No. 10. (R. 1933.)

Relating to Introduction as Evidence of Policy of Insurance.

Of course plaintiff in error was not wrongfully injured because the policy issued by it and sued on was received in evidence. Plaintiff in error may possibly regret it issued that policy, but that is not cause of error.

ASSIGNMENT OF ERROR No. 11. (R. 1933.)

Relating to Objection to Evidence.

Mr. Selig, there referred to, was one of the agents of plaintiff in error through whom its transaction in relation to the issuing of the policy was conducted (r. 1496), etc., and of course he was a proper agent of the company to deliver the policy for it to defendant in error.

ASSIGNMENT OF ERROR No. 12. (R. 1933–4.)

Relating to Objection to Evidence.

When defendant in error was first called as a witness at the trial commencing in October, 1899, she testified to the effect that her name was then Sallie E. Smith; that when the suit was brought her name was Sallie E. Hillmon; that since then she had married James C. Smith. The trial court instructed the jury to the effect that such last marriage was not evidence of the death of John W. Hillmon (r. 151), and therefore of course it was proper for her to explain how she

whose maiden name was Sallie E. Quinn (r. 744), and who married Hillmon on the 3rd of October, 1878 (r. 748, 782, 785, 787, 789, etc.), came to be known as Sallie E. Smith.

ASSIGNMENT OF ERROR No. 13. (R. 1934, 167.)

Relating to Objection to Evidence.

Mr. Green had not testified that he had ever seen John W. Hillmon measured, or that he was present at any time when John W. Hillmon was measured, nor had he stated that Stewart measured Hillmon, or what the measurement of Hillmon actually was, he had testified as shown at record 154 to 167, to the effect that Dr. J. H. Stuart, (sometimes misspelled "Stewart") had at the several trials of the cases had in 1882, 1885 and 1888, testified that he, Stuart, wrote the height of Hillmon 5 feet 11 inches, shown in the applications and medical examiner's certificates thereto set forth at r. 178, 184, 195, 198, and that there had not been any pretense before the trial of 1895, to the contrary — yet Mr. Green had not pretended or in any manner testified that he was present or of his own knowledge knew of Hillmon being actually measured at any time — and from his own testimony he had showed that he should have qualified the two last answers, "Yes, sir," at record 167, by adding thereto the words, "that is Stuart so stated or testified. I do not myself know of Hillmon having been actually measured" — but irrespective of those answers being so limited, it is certain that he, Green, had not as a witness stated or testified to anything which would make any proper answer to the objected to question competent, relevant or material.

And *further*, that objected to question was certainly irrelevant and immaterial, and incompetent, because whatever Mr. Green had testified to was *already* done, the Court and the jury *had heard the same*, all of the testimony he had given, and whether Mr. Barker, the counsel who propounded that objected to question, did or did not know what Mr. Green had testified to on the subject asked about, was certainly *irrelevant* and *immaterial*. If instead of the objected

to question Mr. Barker had asked Mr. Green *when any measurement referred to had actually been made*, then Mr. Green, if he of his own knowledge knew, could have made appropriate answer, but Mr. Barker did not ask *that* question; it is evident he was trying to get hearsay evidence before the Court and jury through the medium of, and as to what Mr. Green had heard on that subject, not limited as to what Mr. Green had heard Dr. Stuart state at some time or testify to at the trials of the cases — therefore the objections to that question were properly sustained, as well as for the further reason that what Mr. Green knew about the time when any actual measurement was made was immaterial and not relevant for many reasons, including that it was not pretended, stated or shown, or testified to, that Mr. Green of his own knowledge had stated or testified what the actual height of Hillmon was, or that he knew of any measurement being actually made.

ASSIGNMENTS OF ERROR Nos. 14, 15 and 15½.

(R. 1934–5.)

Relating to Objections to Evidence.

The witness, Dr. John D. Patterson, was a dentist, and as such had for the insurance companies made a model of the teeth and jaws of the dead body, and testified to the effect that one of the teeth in the upper left side jaw was short, and explained how that shortage would cause the mouth of the living Hillmon to appear as though that short tooth was missing—evidently the same tooth spoken of by Henry Hillmon at record 1094, Theodore Wiseman, record 861, 882 to 901, Claude Holiday, record 994 and 997 and Tinetta Cercadell, record 1038 (*lower corner seemed worn off*), and also explained that the mark on a finger of the deceased would be made by the ring referred to (r. 236 to 243, and 248 to 250). The matter about the teeth and the ring and ring mark, and the loss of the ring at a previous trial were all matters relating to the identification of the corpse (see r. 227, 231, 232,

242, 243, 249, 250, 779), ring lost at the trial in 1895 (r. 779), wherefore and for other manifest reasons we submit those assignments of error are not well founded.

ASSIGNMENTS OF ERROR Nos. 16, 17 and 18.

(R. 1935–6.)

Relating to Objections to Testimony About Height of Hillmon.

We refer to what is elsewhere herein said or shown in the record in relation to the height of Hillmon, and the length of the corpse, particularly in the foregoing description of his person, and the statements about his height in the applications, etc. It was claimed at the trial by defendant in error that Hillmon was 5 feet 11½ inches high, or about that, corresponding in height to the length of the corpse (r. 940, 926), whilst on the part of plaintiff in error it was claimed that he was much shorter; we submit it was proper to ask those objected to questions.

ASSIGNMENT OF ERROR No. 19.

(R. 1936 and 531 to 544.)

Relating to Objections to Evidence.

Mary Judson showed by her testimony at record 531–2 that she was competent and had had opportunity to know the condition of the teeth of Hillmon, whether any thereof were actually missing or not; she answered according to that knowledge on a matter that she knew about, as she properly might; the objected to question was only one way of getting at the extent of her observation and knowledge.

ASSIGNMENTS OF ERROR Nos. 20 and 21.

(R. 1936, 504.)

Relating to Objections to Evidence.

That the objected to questions were competent and proper is we submit shown by the opinion of this Court on the sub-

ject of intent, declarations, etc., in the case of the Insurance Companies vs. Hillmon, 145 U. S. 285.

And plaintiff in error on cross-examination of Brown asked for and obtained further testimony on the same subject (r. 381, Q. & A. 398) in a manner that showed it considered the same proper matter for Brown to testify in relation to, and thereby waived its former objection to similar evidence.

ASSIGNMENTS OF ERROR, Nos. 22, 23, 24, 25 and 26, r. 1936 to 1943, 339, 340, relating to questions Nos. 401, 402, 403, 404, 410, 411, 412, 413, 414, 622, 763, 773, 774, 775, mentioned at record 339, 340, *asking the witness, Brown, on cross-examination as to whether he had not made contradictory statements in a written instrument without exhibiting to him such writing.*

By those several questions plaintiff in error was seeking to prove the substance and contents, and words and language of and used in a written instrument, without having shown the same to have been lost or destroyed, for the purpose of impeaching the credibility and testimony of Brown given in his examination in chief to the effect that he had *accidentally* killed John W. Hillmon on the 17th of March, 1879, in their camp on Crooked Creek, in Barber County, Kansas (r. 344–5), and without having *shown* or *exhibited* the *same* to Brown when or before those questions were asked him, and without any proper foundation, reason or excuse having been laid for asking him such questions on such cross-examination, *without exhibiting* to him the written instrument inquired about, because of which and for the further reason that defendants in the trial court, through their attorneys, had it in their power to have shown to Brown when his deposition was being taken (r. 593), as well as when they wished said objected to questions to be read (r. 593), the paper writing alluded to in the questions—the objections to those questions were sustained only provisionally, that is, with the provision that if the original instrument should be produced or its loss accounted for the objections would be overruled (r. 339–40).

That the ruling of the Court on this matter was proper, see—

1 Greenleaf on Evidence, Secs. 463 and 464.

And as that written instrument was afterwards produced in court and read in evidence (r. 1283–6), plaintiff in error could then have read those objected to questions and answers thereto to the jury, and therefore, irrespective of any other reason, it cannot now be heard to complain because the trial court so provisionally sustained such objections.

Thiede vs. Utah Territory, 159 U. S. 511, 519.

Afterwards at the trial the writing alluded to was in pieces as torn up produced in Court by Mr. Green (r. 1283–4) and read to the jury from a copy made on the 13th of September, 1879, certified to be correct over the signatures of Mr. Green and Buchan (r. 1284 to 1287), but neither such certified copy or the original, neither whole or as torn or any part thereof, shown to Brown when he was testifying.

The testimony shows that Buchan gave the said torn written instrument to one of the attorneys for the insurance companies when the deposition of Brown was being taken, (r. 593, 1278, 1280, 1283–4, 583), which were afterwards produced as aforesaid by Mr. Green at the trial (r. 1283–4), and as Mr. Green had had and knew of said certified copy, of course the original instrument, with or without such copy, should have been shown Brown when he was thus cross-examined and attempted to be impeached by those objected to questions, thus provisionally kept out of evidence, but when the same had been read in evidence, as aforesaid, and as shown at r. 1284, etc., the provisional ruling out of those questions (r. 340) became inoperative, and plaintiff in error was then under permission to read the same in evidence, because of the provisional ruling shown at record 340, and therefore we submit the exceptions, assignments of error, in relation to those questions are not well taken, and should be disregarded or overruled, whether the Court was or was not right in first provisionally sustaining the objection, but we submit it was right in so provisionally sustaining the objections.

And further, even if the trial court had technically erred in sustaining provisionally those objections, such technical error was as to plaintiff in error harmless, and not reversible error because the answers thereto were such as would not have benefited plaintiff in error to have read the same, as shown by the answers in the record following those questions respectively.

And further, in the same deposition which contained those objected to questions, John H. Brown, on further cross-examination, testified to the effect that the statement asked about in those objected to questions was false (r. 418, A. 777; 519, A. 130), and that he did not tell Buchan such things as therein stated (r. 436–7, 405, 441–2–3–4–5–6–7–8–9, 450, 452–3, 472–3–4, 477, 478, questions and answers 630, 1059, 1060, 1112 to 1146, and 1175, 1176, 1184–5–6, 1294 to 1299, 1332, 1346 to 1350), including that he (Brown) had not ever told Buchan that Hillmon was alive, or that he (Brown) had not so killed Hillmon (r. 404–5, A. 630; 436–7, A. 1059; 1068–9), and thus testified to all that oral evidence was competent on that matter of those objected to questions, and thereby, coupled with the further testimony of Brown given in answer to further questions on such cross-examination, Brown testified to the effect that he did sign and swear to the statement (r. 383, A. 406 to 409, and elsewhere). And as that statement was finally read in evidence (r. 1283–6), it follows that plaintiff in error is not in shape to claim it was injured by or because the objection to those objected to questions was thus provisionally sustained; surely from him they obtained all such oral evidence as was competent for him to give in relation to that statement, which we have seen they did not exhibit to him, although the paper could have been produced and shown to him (as well as the aforesaid certified copy thereof), which we see from 1 Greenleaf on Ev., Sections 463 and 464, they should have done—and could have done—and thus put themselves in position to have asked him such questions as were so objected to, or any other proper questions they might have seen fit—but in any event, it is sure that plaintiff in error was not injured by the provisional sustaining of said objections. An examination of each of those

objected to questions will show that in each thereof he was asked as to the contents of a written instrument, that is, as to all or a part of the contents of said written statement; but when he was asked as to what he had stated to Buchan, he denied, as above shown having stated to Buchan that which really was the contents of that written instrument, but on the contrary, testified to the effect that Buchan invented the same, but did not deny—but conceded—that he signed and swore to the same (r. 383, A. 406–7–8–9)—and there was no question at the trial but that he did sign and swear to the same, as shown at record 1283–6.

As to so much of the assignments of error at page 1943 to 1945 as refer to questions 1378 to 1397. It appears that they, except the two last, referred to the letter set forth at pages 483, 584, 766 and mentioned in the testimony of J. W. Green at page 584, and of Reuben Brown at pages 549, 550, and of defendant in error at page 766, from all which references it appears that Buchan kept that letter until he gave it to the attorneys of the insurance companies, plaintiffs in error, who produced it at the trial, page 584.

And the Court did not sustain any objection to any of those questions, but on the contrary the same were read to the jury—the insurance companies asked those questions, obtained the answers thereto—did not like those answers, wished to withdraw them, but defendant in error objected, and we submit they were properly read, as helping to prove how the release pleaded by the respective insurance companies were obtained, that letter, being in the nature of a halter around the neck of the witness John H. Brown, would of course assist those companies through Buchan to get Brown to sign the writing dated of the 4th September, 1879, and those two papers with the other influences operating on him of course induced Brown to assist Buchan to get said releases from defendant in error, as shown at pages 766 to 779, 812 to 825, 830, 831, 1897 to 1900, and 495 to 502. And in this connection we refer to, to what we elsewhere herein say in relation to assignments of error Nos. 27 to 32, 59 and 105, with which the matter of said assignments of error Nos. 22 to 26 should be considered.

THE ALLEGED RELEASE.

ASSIGNMENTS OF ERROR—No. 27, r. 1945–6, 546; No. 28, r. 1946, 576; No. 29, r. 1946, 577; No. 30, r. 1946, 578; No. 32, r. 1948, 580–1; No. 31, r. 1947, 580; No. 59, r. 1955, 835; and No. 105, r. 2006.

All Relating to the Alleged Release, Etc.

Those eight several assignments of error, Nos. 27, 28, 29, 30, 31, 32, 59 and 105, relate to the matter of the unsealed release pleaded by plaintiff in error, dated the 15th of September, 1879, set forth in its answer (r. 18, 19), as its third ground of defense, and to the respective causes of reply thereto of defendant in error, set forth at record 20–22, Nos. 1st, 2d and 3d. The 1st, a general denial of all the allegations in that answer; the 2nd (r. 20) that said release was without consideration; the 3rd (r. 20 to 22), that such release was obtained by fraud, there described, without consideration, and *to evidence supporting* those causes of reply, and which also includes the matter of the refusal of the Court to give refused instruction No. 44, referred to in said assignment of error No. 105, relating to the deposition of John H. Brown, set forth at record 341 to 520, and the written statement of 4th of September, 1879, set forth at record 1284, 1286, and those eight assignments of error are in their nature, when considered in connection with the whole case, pleading, evidence, and rules of law applicable thereto, so intertwined and related to each other as to make it necessary and proper to consider each thereof with the others, and with other parts of the record, to enable the Court to understand the matter of either thereof, notwithstanding any effort on the part of plaintiff in error to separate, or brief, argue, or present the same separately as independent matters, or as though that written statement had been read in evidence to prove the statements therein to be true, *instead of*, as the fact was, being read on and as part of the cross-examination of William J. Buchan, one of its witnesses, for the purpose, among

others (as was by all when it was read understood), to show what kind of a false statement it was he (Buchan), as agent of the plaintiff in error and others, had put in writing (r. 1236, 418, A. 777; 519, A. 130), and that it was such a writing as is alleged in the reply of defendant in error, was obtained and used by said Buchan to assist in the matter of procuring from her the releases (r. 20, 22), as shown by the evidence, by all which it is shown that among other things defendant in error was throughout the case *claiming* that said *written statement* was utterly *false* and *untrue* in every respect, and made, obtained and used to do her wrong and injury.

That Said Release Was Properly Defeated in the Trial Court.

That release was not sealed (r. 19), therefore any rule of law in relation to what cannot be pleaded or proven to defeat a sealed instrument of writing in the courts of the United States has not any application to this case, or to any question that can properly be raised or made by plaintiff in error, and therefore none of the cases that may be cited to show what cannot be pleaded in courts of the United States are in any manner applicable to this case.

Sections 6, 7 and 8, of Chapter 21 of the General Statutes of Kansas 1868, page 183–4, are as follows:

"SEC. 6. The use of private seals in written contracts (except the seals of corporations) is abolished, and the addition of a private seal to an instrument of writing shall not affect its character in any respect.

"SEC. 7. All contracts in writing, signed by the party bound thereby, or his authorized agent or attorney, shall import a consideration.

"SEC. 8. The want or failure, in the whole or in part, of the consideration of a written contract, may be shown as a defense, total or partial, as the case may be, in an action on such contract, brought by one who is not an innocent holder in good faith."

And similar sections of statutes were in force in Kansas whilst it was yet a territory (Laws of Kansas 1859, pages 301–2; Compiled Laws of Kansas 1862, page 351), and similar sections are found in all subsequent compilations of the laws of Kansas (continued in force without reenactment since 1868). That release was made in Kansas, and was therefore, of course, governed by the laws thereof, and any rights in relation thereto were, of course, to be allowed and enforced in the courts of the United States, the same and with like effect as though such matters were being investigated in a State court.

Since the the trial of the case in the Circuit Court, plaintiff in error has for the first time in the Court of Appeals, and here, been trying to make a question to the effect that the trial court did not have jurisdiction to investigate the question as to whether said release was fraudulently obtained or made without consideration, and the plaintiff in error is attempting, without having demurred in the trial court to the aforesaid second and third causes of reply, or otherwise sought to get the same out of the record, and without objecting in the trial court that it did not have jurisdiction to permit therein such investigation.

And in so doing plaintiff in error, in the Court of Appeals and in this Court, in its application for certiorari, claimed—and therefore we suppose it will herein further claim to the effect—that by those three quoted sections the Kansas law-making power *ousted* the courts of the United States held in that State, from, and prevented them from exercising jurisdiction to investigate such questions, that is, whether an unsealed instrument was obtained by fraud or made without consideration, seemingly overlooking the fact that its argument in that respect shows that a United States court could not be ousted by a Kansas statute of jurisdiction which it would have had if those three quoted sections had not been enacted.

And also overlooking the fact that it is here now trying to get this Court to put such a construction on its answer as would permit it to defeat the policy for fraud if it had made

necessary and proper allegations in its answer, which it did not, and even if it had, could not have proved the same.

At common law courts of law had jurisdiction to investigate questions as to whether a contract resting in parol — that is an oral contract, or an unsealed written instrument, had been obtained by fraud, or with or without consideration — and at common law — that is, but for those quoted sections, it would have been necessary for plaintiff in error to have pleaded and proved a consideration for that release — it not being a sealed instrument.

1 Chitty on Pl. (16 Am. Ed.) 300, 382, bottom paging.
4 Enc. Pl. & Pr. 928, 929.

(It is not important to consider whether the recital of the nominal consideration of one dollar in that release did by copying that instrument in the said 3rd defense (r. 19), in effect practically plead consideration or not—although such nominal consideration as that so named in the absence of such copied statutes are not usually enough to support unsealed writings which require a consideration to be shown, because the entire want of consideration therefor was clearly and beyond question shown by the evidence.)

It has not been held by any Kansas Court that those sections in effect *put a seal* to unsealed writings or contracts; whether written or not, they have simply given effect to those three quoted sections, and under those decisions those sections have, as applied to this case, been by Kansas Courts construed to merely change the burden of pleading and proof with reference to the matter of consideration of unsealed written contracts, made by private persons, yet plaintiff in error asks this Court in effect in the face of those three sections, and contrary thereto, to add a seal of defendant in error (when by law she could have none) to that unsealed release, and then to say, that because of the Court so doing, the trial court had not jurisdiction to hear the matter of said 2nd and 3rd causes of reply, whilst but for those three sections plaintiff in error, as we understand it, concedes the trial court had jurisdiction to investigate all

questions in relation to such fraud or want of consideration, thus practically claiming that by the laws of Kansas the Courts of the United States can be ousted of jurisdiction which they would otherwise have. Of course Kansas laws cannot take away any such jurisdiction — and has not attempted so to do.

Said Sec. 8 made special provision for making the defense of want or failure of consideration, either in whole or in part to any written contract, which left that matter as to said unsealed release in the trial court the same as it would have been at common law, except that because of Sec. 7, the release imported a consideration, (unless because of the recital therein of one dollar only such implication was rebutted) and imposed on defendant in error the necessity of pleading want of consideration as she did in her second and third causes of reply, &c.

Those quoted sections of Kansas statutes did not affect the common law in relation to matters of fraud. They have no bearing upon the question as to the manner of proving or pleading fraud in the obtaining of a written instrument.

That the want of consideration and fraud, alleged in said reply, could be pleading against said release without any previous rescission of the release, is shown by the following list of cases, the first two thereof being cases in the State where those three quoted sections were enacted, and the case tried under Section 914 R. S. 1878, page 174, applicable to the pleading and practice therein.

Railway Co. vs. Goodholm, 61 Kansas, 758, 761 to 766, the pleadings in which case are described at id. 759.
Railroad Company vs. Doyle, 18 Kansas, 59, 62.
Union Pacific Ry. Co. vs. Harris, 63 Fed. 800 to 804.
Silk vs. M. R. L. F. A., 28 Atlantic, 445.
Berry vs. A. C. Ins. Co., 39 N. E. 254; s. c., 132 N. Y. 49.
Platt vs. Continental Ins. Co., 19 Atlantic, 637, 638; s. c., 62 Vt. 166.

And see also the following additional cases which, with the six above named cases, are also cited in support of our

contention that plaintiff in error took the release, subject and liable to be defeated in the case and manner in which it was defeated, because of the fraud and want of consideration therefor stated in the reply.

Atlantic Cotton Mills vs. Indian Orchard Mills, 17 N. E. 496, 501; s. c., 147 Mass. 268.
De Souchet vs. Dutcher, 15 N. E. 460; s. c., 113 Ind. 249.
Crain vs. Hunter, 28 N. Y. 389.
Lawrence vs. Hand, 23 Miss. 103, 105.
Bower vs. Johnson, 10 S. and M. 169, 173.
V. S. M. Co. vs. Rheinschild, 25 Kansas, 537.
Fitzsimmons vs. Joslyn, 52 Am. Decs. 46; s. c., 21 Vt. 129.
Union Trust Co. vs. Phillips, 63 N. W. 903.
Albitz vs. M. & P. Ry. Co., 42 N. W. 374.
Michigan M. L. Ins. Co. vs. Naugle, 29 N. E. 393.
Fairchild vs. McMahan, 34 N. E. 779; s. c., 139 N. Y. 290.

And as to any argument or claim of plaintiff in error to the effect that the State of Kansas, could not by said Sec. 8 confer jurisdiction on Courts of the United States, we answer it *could not* by all or any of those three quoted sections take from such Courts any jurisdiction such Courts had independent of those three quoted sections, and also further, the sections of the Kansas statutes, particularly Sec. 8, surely in effect merely left and continued that rule of common law in force as to all Courts and cases. In the replies in this case it was alleged that the release was obtained by fraud and without consideration.

That the 2nd as well as the 3rd cause of reply (r. 20–22) were respectively sufficient and in proper form to admit of proof that the release was without consideration is shown by the case of —

Miller vs. Brumbaugh, 7 Kansas, 343, 348, 353,

whilst the 3rd cause of reply also was to the effect that it was obtained fraudulently without consideration.

And further, in addition to the foregoing, which shows that the release could be defeated in the case as it was, the insurance company did not demur to or in any other manner question the right of the defendant in error to so attack the release in the action at law, and no objection on the trial was made to the introduction of evidence in support of the replication on the ground that the release could not thus be proved in any action at law, or that a suit in equity was necessary to set it aside. It is, after verdict on a proceeding in error, that it for the first time is claimed by the plaintiff in error that the release is to be treated as an instrument under seal, and that it was not competent for a court of law to deal with it, but that recourse should have been had to equity. In answer to this contention, we claim that if such a question could be raised at all, it must have been done by demurrer to the reply or by some seasonable appropriate objection, *in limine* and cannot be done after verdict and after twenty years of litigation, and after a suit in equity to set aside and vacate the release would be barred by limitation. In the case of Union Pacific Ry. Co. vs. Harris, 63 Fed. 800, a similar question was raised, and the Court of Appeals, overruling the point, said:

"The chief contention of the plaintiff in error is that the issues arising on the replication to the defendant's supplemental answer should not have been submitted to the jury. It is said the plaintiff cannot in this action avoid the release for fraud, or show that he was mentally incapable of entering into a valid contract at the time he executed it; that the release can only be avoided upon these grounds by a suit in equity. This question was not raised in the lower court. The defendant did not demur to either of the causes of reply, or move to strike the same out of the reply, but acquiesced in the issues presented, and went to trial thereon, thus conceding that the Court could try the issues presented. These issues were tried to the jury without objection and it is now too late to object for the first time in the Appellate Court to that mode of trial. The objection that an action should have been brought at law instead of in equity, or *vice versa*, is

waived by a failure to interpose it at the proper time in the court of original jurisdiction. (Hollins vs. Iron Co., 150 U. S. 371, 14 Sup. Ct. 127; Insley vs. U. S., 150 U. S. 512, 14 Sup. Ct. 158; Preteca vs. Land Grant Co., 50 Fed. 674, 1 C. C. A. 607, 4 U. S. App. 326; Tyler vs. Savage, 143 U. S. 79, 12 Sup. Ct. 340; Reynes vs. Dumont, 130 U. S. 354, 395, 9 Sup. Ct. 486.) If a party, when sued at law, conceives that the action, or any material issue in it, is of equitable cognizance, he must interpose the objection at the threshold of the case, and will not be heard to make it for the first time in the Appellate Court. The general principle is now well established that an Appellate Court will not entertain an objection to the form of the action, when the objection was not interposed in apt time in the trial court. It will be presumed that the parties assented to the theory that the remedy adopted was the proper one, and they will be held to that theory on appeal. Moreover, it is a general rule that questions not presented to the trial court will be deemed waived. (Elliott, App. Proc. Secs. 658, 679, 690, and citations; Brown vs. Lawler, 21 Minn. 327; Brown vs. Nagel, *id.* 415; Weaver vs. Kintzley, 58 Iowa, 191, 12 N. W. 262; Town of Mentz vs. Cook, 108 N. Y. 504, 15 N. E. 541; Buffalo Stone & Cement Co. vs. Delaware, L. & W. R. Co. [N. Y. App.], 29 N. E. 121; Sexton vs. Pike, 13 Ark. 193; Creely vs. Brick Co. 103 Mass. 514.) In what is here said, we are not to be understood as intimating that, if the defendant had interposed a timely objection to the jurisdiction of the lower court to try the issues presented by the replication, the objection would have been of any avail."

The decisions of this Court, cited by the Court of Appeals in the above case, fully sustain the principle of the decision and are conclusive upon the point that such objection must be taken *in limine* or it will be waived.

And in support of the same proposition, we refer to—

21 Ency. of Pl. and Pr. 666, Sub. 2.

Hooven *et al.* vs. John Featherstone's Sons *et al.*, 111 Fed. 82 (Syl. 8), 87.

And from the foregoing we see that the release *could* properly be *attacked* and *defeated* in the trial court as it was,

notwithstanding any objection plaintiff in error might have made in that court, but if we are wrong in that, then we see plaintiff in error *waived* any such objection, and cannot now here be heard on any such matter.

And still further the plaintiff in error not only did not by demurrer or otherwise in the trial court try to get rid of, or have struck out said 2nd and 3rd causes of reply (r. 20 to 22), but further it did not in the trial court object to any question asked any witness, or to any document or evidence on the ground or claiming that Court did not have jurisdiction to try the question as to whether said release was obtained fraudulently or without consideration, or in any manner make or raise any such question or objection in that trial court, and therefore from the last cited case and the cases therein referred to, it is shown that even if such an objection would have been good if made, it waived it by not properly making the same in that Court. It is true that to some of the testimony offered by the plaintiff in support of the reply, the objection that the offered testimony was "incompetent, irrelevant and immaterial" was made. No other objection was offered.

That any objection to any evidence, question, testimony or document actually made, either to any of the aforesaid questions or evidence mentioned in assignments of error Nos. 27, 28, 29, 30, 31, 32 and 59, or to any other question or evidence in the trial court was not sufficient to make or raise any such jurisdictional question in that Court or in this Court, see—

Ins. Co. vs. Miller, 60 Fed. 254.
Ry. Co. vs. Hall, 66 Fed. 868.
Western C. & M. Co. vs. Berberich, 94 Fed. 329.
M. K. & T. Ry. Co. vs. Elliott, 102 Fed. 96.

And further, by the evidence it was conclusively beyond question proven as matter of law to be determined by the court, that the release was void for want of consideration, and plaintiff in error (and the Mutual Life Ins. Co.) at the trial by its acts conceded such to be the case, by asking instructions accordingly, that is, they, the insurance companies,

including plaintiff in error, asked the Court to give certain instructions to the jury, substantially and in effect conceding and on the basis that it was proper for the court to instruct the jury as it did, as shown by the paragraph at r. 1921, 1922, consisting of the four lower lines on r. 1921 and the fifteen upper lines on r. 1922 including that part thereof in the words following, to-wit:

"As to the releases executed by the plaintiff and set up in the answers of the defendants. While under the law the execution of the written instruments of releases by the plaintiff imports a consideration therefor, nevertheless the undisputed evidence in this case shows that the said releases were wholly without consideration and therefore they are inoperative as releases, and do not constitute a valid defense, and the plaintiff did not, by any of them, release or discharge any cause of action or any other right that she may have had, etc." (R. 1921–1922.)

The insurance companies at the trial acquiesced in this action of the Court, and did not except to the Court so instructing the jury. The only exception taken at any time by the insurance companies or either thereof to the general instructions of the Court, was in the following language:

"We except to what you say on the subject of conspiracy." (R. 1726.)

That such an exception was not sufficient to raise any question as to the exclusion by the Court of the release to the petitioner from consideration by the jury, as such release is, we submit, too plain to require further observation. The Court did not exclude the releases so far as they might operate against the plaintiff in determining other questions, as is shown at r. 1922.

That it is proper for the Court, when the evidence conclusively and beyond question as matter of law proves any matter in issue to be true as alleged by either party—as this matter of want of consideration was so proven—for the

Court to instruct the jury accordingly, as shown by many cases, including the case of—

Marshall vs. Hubbard, 177 U. S. 416, 419.

The evidence in relation to the fraud alleged in the aforesaid third cause of reply not only tended to prove the fraud so alleged, but also tended to prove more, not merely *prima facie*, but conclusively and beyond all question proves the entire want of consideration of any of the releases, including the release to plaintiff in error (at r. 19) for some of the particular evidence sufficiently proving there was not any consideration for that release (or for any of the releases), see r. 773, 830, 831, 1241, 1243, and that there was not to be any consideration therefor see r. 581, 592.

And when the evidence had made it appear conclusively that the RELEASES were obtained without consideration, it was not necessary for defendant in error to offer or introduce any futher proof that they were fraudulently obtained, because either, that is, want of consideration or such fraud, would either by itself without the other, defeat the RELEASES respectively—but proving that the same were without consideration did not make it error to have admitted proof, or to admit further proof, of the alleged fraud in procuring the same—but all of the evidence introduced to help show the fraud alleged in procuring the RELEASES also helped and tended to show the want of consideration therefor, and was competent for that purpose.

Among which mentioned instructions so asked by plaintiff in error are Nos. 1 and 28, and we refer to what we say in relation thereto in connection with our argument herein on the subject of conspiracy, and submit that as the real question in the case was, as stated in those asked instructions, whether the herein mentioned dead body was that of Hillmon or not, that it follows such last mentioned jurisdictional question, as now claimed by plaintiff in error, was *not* in the case, and was not by plaintiff in error supposed to be in the case when it asked those instructions, or at any time whilst the case was being tried.

In further arguing the matter of the above mentioned eight (8) assignments of error, numbers 27, 28, 29, 30, 31, 32, 59 and 105, we will further refer to the matter of such want of consideration for the releases.

The matter in relation to those eight assignments of error and the evidence connected with the questions and answers therein referred to, including how and why the same were obtained and the circumstances under which they were respectively made, constitute and the same are part of a chain of evidence which proves that the aforesaid 2d and 3d causes of reply were true, including that the releases were without consideration and were fraudulently obtained as so alleged.

The record shows testimony among other things in relation to the matter of said 2d and 3d causes of reply, to the effect that Buchan went to see defendant in error at Lawrence about the case. She told him she could not tell him much about it, that he could go and see her lawyers, and when they went to one of them, Borgalthaus, Buchan had practically nothing to say (r. 768). Doubtless he there learned of Borgalthaus the policies were in the hands of Wheat in Leavenworth, who had received the same from defendant in error, in May 1879 (r. 823, 213), which explains why Buchan did not wish afterwards to meet her at Lawrence (r. 769, 817), but preferred Leavenworth where the policies were. Soon after that Brown having been sent by Buchan as elsewhere shown (see r. 496, A. 11, etc.) told her that he had made a statement contrary to his hereinbefore mentioned testimony at the inquests, and that in such statement he had said the aforesaid dead body was not the body of her husband, but was a body her husband had killed, and although asked by defendant in error to explain, Brown didn't explain much, but referred her to Buchan (r. 769, 818–9) and said that if she would go and see Buchan he, Buchan, *would explain it all* and show her the statement, and an appointment was made for a meeting at Leavenworth (r. 769, 818), and that when she arrived at Leavenworth, Buchan avoiding any chance of her going to the office of Clough & Wheat, hereinafter mentioned, met her at the depot

(r. 769, 819), and Buchan asked her to go to the Planters Hotel, stating that Brown would be there (r. 770). They then went to that hotel to a room therein (r. 1240), and there met Brown (r. 770, 820), and there although Buchan admitted that he knew and believed said dead body to be that of Hillmon (r. 517, A. 115) as he had before stated (r. 473–4), yet he among other things asserted and said to her that Brown had made a contrary statement to that he had so made (as herein elsewhere shown) at Lawrence and Medicine Lodge, and that therein Brown had stated that the aforesaid dead body was not that of her husband, Hillmon (r. 770, 820), and had sworn to it (r. 770), and that he being Brown's attorney, there being a warrant out for Brown, she had better surrender the policies (r. 820) (there was really no evidence of any such warrant having ever been issued) and that Brown had so done, that is, made such statement to protect and save himself (Brown) because of such (pretended) warrant (r. 770), and that Brown was frightened (r. 771), and that Brown could not ever be a witness for her (r. 770), and that if she ever did sue on the policies he (Buchan) would put Brown on the stand and that Brown would testify that that dead body was not the body of her husband, but was the body of a man her husband had killed (r. 821–2, 771–2), and that the insurance companies had *millions* where she didn't have *cents* (r. 771), and *never intended* to pay her (r. 771 and 500, A. 36). (Why that by plaintiff in error through its agent Buchan reference to its money power unless meant as a threat to obstruct due administration of justice?) and that Brown being her *main* witness *she could not recover* (r. 771–2, 821–2), and demanded that she surrender the policies (r. 771, 770), and told her she might as well, and had better and must do so (r. 771, 820), and he (Buchan) there also made such further assertions and statements as shown at r. 769 to 772 and 820 to 822, and at r. 496 to 502 and 511 to 520.

And Brown, trying to assist Buchan to get the policies, notwithstanding his opinion about the *stuff* they had made up, previously expressed to Buchan (r. 497), there said he had made such statement, and that he would have to stick to it. (R. 821, 770.) She asked him how he dared to do so. He

said to save himself (r. 770), and sat there with his head hung down as stated at r. 770, 820.

And that she, defendant in error, when thus talked to there at the hotel by Buchan and Brown, *asserted that the aforesaid dead body was that of her husband*, John W. Hillmon (r. 770, 820–1; 517, A. 115; 518, A. 119), and at first refused to give up the policies (r. 770, 820), and said that she would keep them (r. 821), (the interview as shown by the record stated was long) and that she was sick and did not have any dinner, having a headache and fever, and when they (Buchan and Brown) went to dinner, she laid down on a couch, and that Mr. Buchan himself turned waiter, instead of trusting the cup and its contents to a waitress, brought her a cup of tea (and she believed a cracker); that she drank the tea, and laid down, and thinks she took a nap and went to sleep. They were gone some time and then came back, after time for soothing influences of tea to operate. (R. 771.) It is evident that she was utterly overwhelmed, prostrated, sick, *and her capacity to transact business gone*, a young woman unacquainted with the ways and wiles and methods of the wicked or vicious; and they (Buchan and Brown) then came back to the room where she was in that hotel, and reiterated their aforesaid assertions and statements (r. 771, 821), Brown assisting as before (r. 821), and then, which is explained by her then sick, etc., condition, she believed the statement of Buchan, that by reason of Brown having made the aforesaid statement she could never prove her case (r. 771); she had then, because of being so sick, etc., evidently come into a condition to believe and do as Buchan should tell her.

And that towards evening (r. 772, 822; see also r. 501, A. 44), Buchan wanted her to sign some papers, and took the releases and order for the policies out of his pocket and put them on a little stand there (in the room in that hotel where they were) and wanted her to sign them, and that she told him she couldn't sign them, and he said she must sign them, and that she didn't need to read them, to just sign them (r. 772–3, 822–3), and that she signed them *because* Buchan *told her to without reading* or *knowing* the *contents* thereof (r. 772–3, 822–3), without consideration for any of them (r. 773, 830, 831; see

also 1241, 1243, 581, 592), the exhibits Nos. 16, 17 and 19, at said trial being some of those papers (exhibit 16 being the release to the Mutual Life Insurance Company, the exhibit 17 the release to plaintiff in error, by it plead and now relied on (r.19), both dated at Leavenworth the 15th of September, 1879, and copied at r. 585, the exhibit 19 being the order for the policies of the same date copied at r. 596, the releases mentioned by Buchan at r. 1243, 1247, and which Buchan delivered to the representatives of the Ins. Cos., as by him stated at r. 1247, and mentioned by Mr. Green at r. 584–5, the order, the exhibit 19 mentioned by him and copied at r. 596.)

As to whether those releases and order were signed before or after Buchan and defendant in error saw Wheat at the office of Clough and Wheat is not very material, but according to her recollection they were signed before (r. 774, 822), but Buchan testified that they were signed after they went to that office (r. 1241–2). But both of them show by their testimony that the releases were not shown or mentioned at that office or to Wheat. (R. 774, 822, 823, 1241, 1242.) And the same last referred to pages show there was not any such opportunity for her to say anything to Wheat about the releases, as one having either signed the releases or demanding the policies would avail themselves of; and what Buchan afterwards induced her to do in staying away from Lawrence (r. 774 to 778) and elsewhere, proves Buchan intended to keep her from informing any of her attorneys or friends of her having signed any release or of any intention to deliver the policies so long as he could prevent. It will be noticed that although when she demanded the policies, Wheat asked what it meant, she did not explain. For all of anything said at the office of Clough & Wheat, she might have intended to employ Buchan to prosecute her claim on the policies. Nothing was said to Wheat to the contrary, or to indicate she had or intended to abandon her claims on the policies. All they let him know was that she wanted Wheat to let her have the policies she had before in May, 1879 (r 213, 823), delivered to him. And there is not any evidence tending to show that anything was said at that office or to Wheat or any coun-

sel of defendant in error, at that time or until months afterwards, about any release or order for the policies (r. 774, 882–3, 1242.) From all which and the other evidence elsewhere herein cited, it is evident that any statement about *due deliberation*, defendant in error going with them (*meaning the releases*) *herself to the office of her counsel*, etc., is not only not sustained by evidence, but is contrary to the actual facts.

And each of them, by their referred to testimony, show that whilst there was not any intimation made to Wheat, or at the office of Clough & Wheat, that any such written statement had been made by Brown, or of any *intention on her part to abandon her claims on the policies*, or to surrender or give them up, still Buchan and her having so come to the office together, and her asking for the policies and declining to give any explanation as to what she meant, but merely saying she wanted the policies—Buchan staying with her all the time (r. 774)—Wheat said it looked to him like a fraud, and claimed the lien for the attorneys (himself and associates, of course, the amount of the claim, he stated, made effective *his charge of fraud*), declined to give them up (r. 774, 822; see also 1242), and they did not get the policies (r. 774, 882). And Buchan, having failed to get the policies, but having got the releases, he induced defendant in error to go to Wyandotte and remain away from her friends until about the holidays (r. 774 to 778), by telling her that she could not go back to Lawrence (r. 774, 777) or to her mother and family (r. 774, 778), and must not tell them anything she had done—must never tell anybody, any living soul, what she had done (r. 778)—and guided her course, keeping her from her mother until promising her a pass to Colorado, he let go his hold on her (r. 778), when, instead of going to Colorado, she went to her mother, and he procured and sent her such pass (r. 778), and having recovered from her sickness she became herself again (r. 778). He first induced her to go to Wyandotte, where she first stopped at the hotel, then went to his own home and stayed there for some time, as shown at r. 776, 777, 1248.

The release, referred to at r. 830, 1245-6, is a release (marked Exhibit 24) to another company than the petitioner, and was

executed ten days after the release in controversy in this case. It was a second release to the New York Life, and was executed while Mrs. Hillmon was still under the influence of Buchan, and was made at Wyandotte, and has no bearing upon this case, the New York Life Company having settled. And that also was shown to be without consideration (r. 830, 831), yet that is not material in this case.

And here, by way of and as argument and claim what the facts were, let us ask *why* Buchan went and staid until they came away (r. 774), with defendant in error when she went to the office of Clough and Wheat in the futile effort to get from Wheat those policies, *unless it was to prevent* defendant in error—by his presence and anything he might need to say by look, gesture or word—from explaining to Wheat (as it was reasonable to anticipate she would be there asked what she meant and why she then wanted the policies) why she wanted the policies and tell him all that Buchan and Brown had been saying and doing.

AND ALSO WHY Buchan, after having as herein shown obtained from her the releases, *induced* her, as shown at r. 774, 778, etc., not to return to Lawrence or to her mother, on the way to see whom she was when intercepted by Brown when sent by Buchan to get her to see him (Buchan) at Leavenworth (r. 814), or go back to Lawrence, and tell her she could not go back to Lawrence, or to her mother, or family, and that she must not tell them anything she had done, must never tell anybody, any living soul what she had done (r. 778), but to go to Wyandotte, and there after detaining her at a hotel a short time *take her to his own home* for a while (r. 777), (admitted by Buchan, r. 1248), she being a stranger to him and his family except as being thrown together in this transaction (r. 777), and when she evidently becoming dissatisfied with staying there, and comparatively restless, he still endeavoring to keep her from her mother and her home at Lawrence, did what he could in that respect until he could procure for her a pass to Colorado (r. 777–8), let her go to an aunt of hers at Trenton (r. 777–8), he having previously called her back from after a temporary visit to a cousin at Ottawa (r. 777), under pretense of wishing to cure a mistake in one

of the releases to the New York Life (r. 1244–56), and she thereafter about the holidays returning to her mother (r. 778), he sent her the pass to Colorado (r. 778), all as shown at r. 774 to 778, *unless* he did so at least at first to prevent such a *personal sickness*, and *condition*, of hers from immediately and *before her recovery* becoming known to her mother, etc., or at Lawrence, as would injure any claim or pretense he or the insurance companies might, if litigation over the policies and releases should arise, to the effect she had pursued him to get an opportunity to give him the policies or releases (see r. 1241–2–3) *and also unless* he did so to get her off to Colorado, and possibly lost to her mother, and friends, or *at least* to get her into a part of the country where if she should afterwards sue and attempt to recover on the policies, the insurance companies might with help of that written statement, try to make a claim, she went to see a living Hillmon, such as plaintiff in error alleged in its 2d supposed defense, apparently her aunt at Trenton helped to frustrate that scheme, and it like others concocted as shown by the evidence finally went amiss (as an ancient proverb says many another has).

AND ALSO WHY, if as claimed by Buchan and plaintiff in error, as shown at r. 1241–2–3 and elsewhere, defendant in error was seeking an opportunity to (or would when herself) give up or surrender the policies or make releases when she was in condition fit to transact business—she did not herself first go alone—or with her mother or other friend as she might choose, to Wheat, to whom she had in May, 1879 (r. 823) (when it was time to be making preliminary preparations for collecting the policies) delivered the policies, and ask him for them, giving or not giving him her reasons therefor, without Buchan going with her and *staying with her* throughout the interview with Wheat (r. 774, 1241–2).

AND ALSO WHY Buchan did not first retire *alone* from the office of Clough & Wheat, when Wheat declined to deliver the policies (r. 774, 1242) and gave defendant in error an opportunity to give the explanation to Wheat he asked for (r. 774), which propriety and common courtesy would have required him to, and as any one acting in *good faith*, would have done, instead of so *staying there* with her

without himself giving such explanation, and after leaving that office complainingly finding fault with her for not having *boldness* enough to insist on getting the policies (r. 774), and when she said she couldn't (r. 774) going back to the hotel with his *victim*, a woman in her then situation, and there and afterwards trying to complete *the* work he was engaged in for hire, as shown at r. 581, 592, 580, and elsewhere, and for which and for getting the written statement which so helped him to get the releases—that is for so trying to beat a woman out of her rights, the insurance companies in pursuance of the promises of its representatives paid him (r. 1247–8, 1288, 1262) *unless* it was because he knew, at least apprehended, that if he left her in that office with Wheat, without his presence, she under and because of what had occurred at the hotel to intimidate her would explain and state to Wheat the situation, and what Buchan and Brown had said and done, and what they wanted, and that Wheat would then show her the fraud, weakness and fallacy of all the doings, assertions and arguments Buchan and Brown had been performing and making; and that if Buchan is right in saying that the releases and order for the policies he finally obtained that day, were made after they returned to the hotel, after leaving Wheat (r. 1241–2–3), that he knew, at least apprehended, he would not get them; or if signed before visiting that office or seeing Wheat, that he apprehended and knew he would fail to take her to Wyandotte, and keep her at his home and elsewhere until she recovered from her sickness and he could get her off to Colorado or elsewhere, to get color for what he had (as herein shown) written in the aforesaid so-called statement.

AND ALSO WHY, if, as claimed by plaintiff in error and Buchan, defendant in error was, when well and in condition to properly transact business, as he found her when recently he saw her at the office of Borgalthaus, in Lawrence (r. 768), seeking an opportunity to give up and surrender the policies or release them, as shown at r. 1241–2, and elsewhere herein, and by the claims of plaintiff in error herein, did Munn, agent of the insurance companies, employ Buchan, as shown

at r. 580, 581, 592, 1249, and elsewhere, to procure the releases.

AND ALSO WHY—if it was supposed by the agents of the insurance companies surrender or release of the policies could be procured from defendant in error by fair or honorable means or methods (without payment of sufficient consideration)—did Munn, the agent of the insurance companies (r. 1254, etc.), with the approbation and approval of Mr. Barker and Green (Green then County Attorney of Douglas County, in which the paper copied at r. 580 was made), attorneys for the insurance companies, make that compromising and improper paper set forth at r. 580, and promise to pay Buchan if he should get up the policies, and pay him his expenses for making the effort if he failed (r. 581, 592)—all as shown at r. 575 to 597—the making of which Munn paper will be seen by reference to what we herein say in reference to assignments of error 31 and 59 was necessary, at least done to get Buchan to proceed, and after showing and explaining the same to Brown, with the help of Brown, get up (surrender) the policies, or failing that, their then supposed equivalent—the releases. All which helps to prove the fraud and want of consideration in said reply alleged.

And after the releases and order for the policies had by the insurance companies by their agents, including Buchan, been obtained as aforesaid by use of the means and methods shown by the evidence, that written statement having thus answered some of the purposes, that of helping to get such releases of the policies, etc., for which it was so obtained, was torn and thrown into the stove, used as a waste basket, in the office of Buchan at Wyandotte, as shown at r. 502, 520, 1246, 1276–7, to apparently keep the promise of Buchan made to Brown, shown at r. 457–8, but whilst thus keeping such last mentioned promise to the eye, Buchan broke it for the benefit of his principles, the insurance companies, for whom he was active throughout those transactions, by taking that torn statement out of that stove, and afterwards delivering it to the representatives of the insurance companies, as shown at r. 1276–7–8, 1280, 1283–4 and 583–4, who produced the same at the trial (r. 1283–4, 584); all of which, when considered

with the herein mentioned and referred to testimony of Mr. Green, one of the counsel for plaintiff in error, and of Mr. Buchan, and of defendant in error, some thereof referred to in the stating part of this brief, more in this part of our argument relating to the eight assignments of error we are discussing together, proves beyond reasonable doubt, certainly *prima facie*, which is enough for the purposes of this argument, that said written statement was obtained to injure defendant in error, destroy and render worthless testimony favorable to her, including the character of Brown for truth and veracity, and to get said policies or their then supposed equivalent, those releases, from her, as alleged in said reply.

ASSIGNMENT OF ERROR No. 27. (R. 1945–6, 546.)

Relating to Objections to Evidence.

The objected to question and answer in this No. 27, was but a part of the conversations and communications had between Buchan and Reuben Brown, *by means of which* Buchan *procured* the assistance of Reuben Brown to get, and in and about the matter of getting, the herein elsewhere mentioned false statement (r. 418, A. 777; 519, A. 130) set forth at r. 1284–6, from John H. Brown, as shown at r. 544 to 554, 559, 560–1–2–3, and elsewhere, particularly at r. 548 (top of page). Such conversations commenced by reason of Buchan by letters getting Reuben Brown to call on him, Buchan (r. 545–6), and continued until that false statement was procured by Buchan with the assistance of Reuben Brown, as elsewhere herein shown.

Reuben Brown, as shown by his testimony, set forth at r. 544 to 575, corroborated John H. Brown and testified to the effect that Buchan, wanting such false statement from John H. Brown as he finally obtained, solicited the assistance of Reuben Brown to get it, such false and *different* statement (r. 548, 552–3, 560–1, 565, 569, 570–1–2), and obtained such assistance because Buchan, an attorney, caused Reuben to believe it was necessary for John H. Brown to make such dif-

ferent and false statement *to please Buchan and the insurance men*, to avoid being persecuted, arrested, put in jail, and because of the moneyed power of the insurance companies, sent to the penitentiary for murder, he (Reuben,) knowing John had killed Hillmon.

In this connection, and also with reference to the matter of assignment of error No. 105, we request attention to the fact that Buchan, when talking threateningly with John H. Brown and Reuben Brown, or either of them, about the danger John H. Brown was in of being arrested, put in jail, prosecuted for murder and sent to the penitentiary, did not at any time to them, or either of them, say or assert or threaten that John H. Brown was in any danger of being arrested, prosecuted or convicted for the murder of any person *other than* that of John W. Hillmon, but that on the contrary, he (Buchan) so worded his language in that respect as to naturally convey the idea to both of them respectively that John H. Brown would be at the instance and because of the influence of the insurance companies and their money, arrested, tried and convicted of murder for killing John W. Hillmon—killing of whom was by John H. Brown admitted from the hour Hillmon was killed, when John H. Brown and Hillmon were alone—and to which killing he testified at the several inquests and by making the proofs of death of Hillmon as herein elsewhere shown, and that unless John H. Brown made such false and *different* statement as Buchan wanted [and was as herein shown employed to obtain and paid for obtaining (r. 1262, 1247–8, 1288)] the insurance companies would (as both Browns would readily comprehend danger of) cause John H. Brown to be arrested, put in jail, tried and convicted of an alleged crime of murder for killing Hillmon, he (John H. Brown) having *no evidence* other than *his own* to show that the killing *was accidental*, both he and Reuben Brown were scared, the one (John H. Brown) into signing such false statement as Buchan wanted and wrote in his own language (as herein shown), the other (Reuben Brown), as shown by the testimony herein, advising him so to do at the instance of Buchan. And whilst of course it was wrong for John H. Brown to sign such statement, as he

finally did under the advice and threatening demeanor of his attorney, Buchan (and paid destroyer of Brown's character for truth and veracity, acting under pretense of giving disinterested advice to John H. Brown, as his attorney), still we submit that it was much more wrong for Buchan to procure such a statement under the circumstances and by use of the influence which is shown he did, at the instance of Munn, Barker, et al. (r. 1262), and as they (Munn, Barker and others) did induce and pay Buchan for so doing, than it was for John H. Brown to yield to the pressure brought on him. And that the insurance companies did a still greater wrong in and by employing Buchan to and paying him for so doing.

And in this connection, we submit that legally as well as morally anything that can properly be said by way of animadversion on Brown should at the same time be applied to this plaintiff in error, and all its advisers and employees who helped it in the matter of the scheme which resulted in the procuration of said written statement and the releases, for surely it is no excuse to plaintiff in error that on its part it was done to get away from liability and to therefore ask to be excused from its share in the business, and this helps to illustrate why it should not have such use of the written statement as it claims by its 105th assignment of error.

ASSIGNMENTS OF ERROR—No. 28, r. 1946, 576; No. 29, r. 1946, 577; No. 30, r. 1946, 578; No. 32, r. 1948, 580–1.

Relating to Objections to Evidence.

The several questions and answers referred to in those four last referred to assignments of error were a part of the testimony in the case which connected the plaintiff in error with all of the acts and doings of William J. Buchan in relation to the written statement at r. 1284–6 and the release pleaded (r. 19) and the methods and practices used to obtain each of the same, and we here refer to what we have before and do hereinafter say on those subjects, particularly to what

we say in relation to the other four of the last mentioned eight assignments of error, as though here repeated, and particularly to the evidence of James W. Green, one of the attorneys for plaintiff in error at r. 575 to 597, Theodore Wiseman at r. 892–3 about employment of Mr. Barker, and at r. 884–5–6–7 about his own employment, all of which with evidence elsewhere herein cited, connects the insurance companies, including plaintiff in error through their attorneys and agents, with all that Buchan did in or about the matter of procuring the release shown at r. 19, or the written statement at r. 1284–6, as well as helping to show that said release was obtained by fraud and without consideration, and further by accepting and pleading the release and paying Buchan for what he did in about the matter of obtaining the written statement and release, as shown at r. 1262, 1247–8, 1288, plaintiff in error and the other insurance companies ratified, adopted and became to defendant in error responsible and answerable for all of the acts of the several persons through whom the same were respectively obtained, including what each said to help procure or to cause the same to be procured.

ASSIGNMENTS OF ERROR—No. 31, r. 1947, 580, and No. 59, r. 1955, 835.

Relating to Objections to Evidence.

The objected to written instrument referred to in those Nos. 31 and 59 was a part of the evidence which connected the insurance companies, including plaintiff in error, with all that Buchan did in or about the matter of procuring said release (r. 19). Buchan knew that Munn was agent of the insurance companies, including plaintiff in error, for which he, Munn, made the same (r. 1254), and that although he, Buchan, had procured the aforesaid written statement set forth at r. 1284–6, at the instigation of the insurance companies and their agents, including Munn, as shown at r. 1258, 1262, 1268–9, and elsewhere by evidence cited herein, still he (Buchan) would not, certainly did not proceed further

in the scheme of getting the policies or such releases from defendant in error until Munn gave him that objected to document (copied in said Nos. 31 and 59), as shown at r. 578–9, 580–1–2, 592, 1238–9, 1270–1–2–3–4, and had himself (Buchan) shown and explained the same to John H. Brown (r. 1279, 1290), and then in pursuance of the whole scheme from the beginning, Buchan being expressly told that nothing should be given defendant in error (r. 581, 592), Buchan, with the help of John H. Brown in the manner elsewhere herein shown, proceeded and got for the insurance companies the releases (r. 1243) and then delivered the same to the representative of the insurance companies, Munn, (r. 1294, 1247, 584–5), and the insurance companies paid him for so doing (r. 1247–8, 1288, 1262), and plaintiff in error having plead its release, so obtained. (R. 19.) Surely it was proper for the trial court to permit the jury to know of the document, said Munn paper, which performed so important a part in the whole scheme of getting the releases, to-wit: that of helping to keep Buchan and Brown safe as against anything the insurance companies or their agent, Munn, might attempt after getting hold of such false statement, set forth at r. 1284–6, in any direction, as well as to induce Buchan and Brown to proceed in the matter of getting the releases.

When Munn got hold of the written statement he had, as agent of plaintiff in error, employed Buchan to get (r. 1262), he became haughty and stuck it into his pocket, but Buchan, insisting on honor, even among men engaged in such scheme as they were, got the paper and temporarily withdrew until Messrs. Green and Barker—to use Mr. Green's language (r. 583)—*harmonized things*, and brought Munn back into working shape and to realize that to complete the object of all their toils more was to be done, and that if the means used to obtain that written instrument, as herein shown, should be exposed by a prosecution of Brown, it might do them and the insurance companies more harm than Brown (r. 582, 1238-9, 1271–2), and then Munn went into nearly, if not quite, as bad a position by his making the so-called "Munn paper" (r. 580) as Buchan was because of having done by his client (Brown) as he had by getting the written statement; and

Buchan, after the outbreak of Munn, wanting something that would cause all to stand by each other (as other gentlemen sometimes demand), would not proceed to get the releases or further treat with the man who had, as agent of plaintiff in error and the other interested insurance companies, as shown at r. 1262, 1268, etc., induced him to get the statement, until he got said Munn paper—all which is appropriate matter to consider why all of the refused instructions relating to either of those papers should have been refused, as well as the whitewashing instructions asked.

ASSIGNMENT OF ERROR No. 105. (R. 2006.)

Relating to the Refusal of the Trial Court to Give an Instruction in the Words Following as Well as to the Release.

"No. 44. The jury are instructed that the statement signed and sworn to by John H. Brown on the 4th day of September, 1879, having been introduced in evidence by the plaintiff, may be considered in connection with the deposition of John H. Brown as evidence of the facts therein stated under oath, against the plaintiff, with like effect as the deposition of John H. Brown; and may also be considered as affecting the credibility of said Brown as a witness."

There was not any exception whatever taken in any form to that part of the charge of the Court to the jury which, as set forth at r. 1922 and 1923–4, is to the effect, among other things, that the jury might consider the matter of that written statement as affecting the credibility of John H. Brown, and that making it would not constitute perjury, because it was given *ex parte* and not in any proceeding in court, nor in any proceeding authorized by law, by which part of the charge, shown at r. 1923, the Court, in effect, gave so much of said refused instruction No. 44 as related to the matter of that statement affecting the credibility of John H. Brown. And we contend that the Court did not err in or by charging the jury as it did in relation to the matter of that statement, but whether it did or not, is not matter that can now here be

considered, because plaintiff in error did not except to the Court so charging the jury.

And in this connection we refer to the foregoing part of this brief, which relates to the matter of the want of any such exception to the refusal of the Court to give to the jury that 44th refused instruction, or any of the instructions asked by plaintiff in error, further than as incorporated in and given as part of its charge, as though here repeated, and we contend that plaintiff in error cannot now here be heard to claim it has any such exception on or because of which this Court can or will consider, investigate or determine as to whether the trial court did or did not err in or by refusing to give that instruction No. 44, to the jury, because several of the instructions (we claim all thereof) were certainly properly refused, and the exception really taken was to the whole series set forth at r. 1904 to 1915 as a unit. But if the Court shall be of the opinion we are wrong as to that, then we request attention to the following:

PLAINTIFF IN ERROR, WITH HELP OF THE OTHER INTERESTED INSURANCE COMPANIES, THROUGH ITS AND THEIR AGENTS, INTRODUCED THE WRITTEN STATEMENT INTO THE CASE.

That the plaintiff in error and the other insurance companies interested in 1879, through their and its agents, to work up a scheme to defeat defendant in error, by corrupt, vicious and reprehensible means and practices *invented*, MANUFACTURED, procured, wrote, *paid for* and *introduced* into the case, the written instrument (r. 1284–6) mentioned in that refused instruction No. 44, among other purposes, to use and operate, as it was used and operated, against defendant in error, as a weapon offensive and defensive, equivalent to a brickbat, slung shot, club or dose of poison, is shown not merely *prima facie*, enough for the purposes of this case, but beyond any reasonable doubt, and is cause and sufficient reason irre-

spective and independent of any other of which there are many, why that requested instruction should not have been given.

And having so done, and its wrongful and evil practices in that matter having been fully exposed, largely by the testimony of its own agent and witness, Mr. Buchan, it surely was not entitled to an instruction (as No. 44 was), to the effect that a part of the evidence which showed such, its wrongful acts and practices, should be treated and considered as affirmative testimony against defendant in error, as requested by that refused instruction, and we request attention of the Court to the irony, sarcasm and sophistry shown by requesting that instruction to be given the jury after exposure of what it, plaintiff in error, had done in relation to the matter of that "written statement" the "Munn paper" and the "release," coupled with evidence of a hope, that by sophistry and its own high and great presence and personality, it might cause the Court to overlook all its wrongful and evil practices, and consider the part of the exposed tangled web it had sought to weave around the case of defendant in error against it consisting of said so invented, made and manufactured written statement, as evidence against her.

When the action was instituted upon the policy, the release was pleaded as a defense thereto, and it became necessary, in order to defeat the release, to show the circumstances under which it was obtained, which could only be done by, among other things, putting the jury in possession of the facts with reference to the use that was made of this false statement of Brown's. After the making thereof, and the institution of the action upon the policy by Mrs. Hillmon, she gave notice to the insurance companies and took the deposition of Brown. In this deposition he reiterated what he had testified to at the coroner's inquest, and described in detail the accidental killing of Hillmon. He was subjected to a most thorough and searching cross-examination by the attorneys for the insurance companies; he was confronted with the fact that he had made this statement, but utterly denied the truth of the same, and explained the manner in

which it had been obtained from him. This deposition was introduced in evidence by the plaintiff, but the contents of the statement, which was brought into and became a part of the deposition by the cross-examination, was in effect put before the jury and introduced into the case by plaintiff in error; and it did so further by calling Buchan and examining him as a witness-in-chief, as shown at r. 1227 to 1250, and thus the matter of that written statement was fully introduced in evidence in the case by plaintiff in error. It is true the statement was read to the jury by the defendant in error on and as part of the cross-examination of Buchan after he had testified, as shown at r. 1227 to 1284, but it was well understood to be the evidence of the defendant insurance companies. The trial judge evidently so understood, and in its general charge the Court so treated it, saying:

"The deposition of John H. Brown was read to you *on behalf of the plaintiff.*

"*On behalf of the defendants*, evidence was introduced tending to show that he made oral declarations to W. J. Buchan, and showing that he also signed and swore to a statement contrary to his testimony given before you."

The assertion of the Court in this instruction that this statement was evidence *on behalf of the defendants*, was not excepted to in any way by the counsel for the insurance companies. Clearly, if the counsel for the insurance companies understood or believed this characterization of the statement signed by John H. Brown, as evidence on behalf of the defendants, to be erroneous and to have resulted from inadvertence or misapprehension of the judge, they should then and there have excepted and called attention thereto, that the trial judge might have corrected his error, or inadvertence, if any there was.

In any event, whether the statement of John H. Brown is to be treated as the evidence of the plaintiff or as the evidence of the defendant, we contend that the instruction of the Court correctly stated the law applicable to the case, and, especially in the absence of any exception by the insurance

companies, they ought not to be heard to complain of the same.

In some form it was necessary that the contents of the statement should be made known to the jury to enable the plaintiff to show the manner and means by which the plaintiff was induced to execute the release.

Any claim that the plaintiff, in reading this statement, was understood by the insurance companies, the Court or the jury, to introduce the same as evidence of truth of the facts therein stated, is in conflict with the entire theory of the case. The exact reverse was true and was so understood by all concerned. It was contended at all times by the plaintiff that this statement was false; that the insurance companies had corrupted the plaintiff's witness; that because of the obtaining of that false statement, and by other means, the plaintiff had been fraudulently induced, by plaintiff in error and its assistants, to sign the release without any consideration.

Now we respectfully submit from an examination of the circumstances under which this statement was read to the jury, whether it would not be a most violent and unreasonable construction of the conduct of the parties, their counsel and the trial judge, to say that the plaintiff intended to or did introduce the same as evidence of the truth of its contents, or to say that the defendant had reason to suppose or believe that the plaintiff so intended it or had any right to "rely" or did "rely" upon any such supposition, and whether the trial court, in view of its instructions and all of its rulings, believed or supposed at the time the same was read that the plaintiff intended to introduce it for any such purpose, or that the defendants or the jury understood that the plaintiff so introduced it, or had any right to rely upon any such supposition.

The insurance companies at all times understood, and the trial judge at all times understood, that the plaintiff claimed that this statement was wholly and absolutely false and corrupt, and was obtained by corrupt, vicious and fraudulent means for the purpose, among other things, of using it to

extort the release from Mrs. Hillmon. To say now that the insurance companies relied upon the belief that the plaintiff introduced the same for the purpose of proving the truth of its contents, or to prove the contents thereof to be true, we submit is absurd, and would give the insurance companies the advantage of a falsity in that when this statement was read the plaintiff did not expressly state that it was introduced for a limited purpose, although the defendant and the Court both so understood it, and surely under the pleadings it was not necessary so to do, and so to have done would not have had any effect, because how it was to be treated depended upon the issues in the case.

But if the *ex-parte* statement of John H. Brown, in the language of said 44th special instruction, is to be treated "as evidence of the facts therein stated under oath, against the plaintiff," still said 44th special instruction is vicious and misleading and invades the province of the jury, in this that said *ex-parte* statement signed by Brown is wholly and irreconcilably in conflict with the deposition of said Brown upon the same subject, and the instruction which required the jury to treat the same "with like effect as the deposition," eliminates and withdraws from the consideration of the jury all of the numerous tests, including cross-examination arising from the evidence, and proper to be applied by the jury in determining which of said two items of irreconcilable evidence it would believe.

We submit that it was the province of the jury alone, having both the statement and the deposition before them, to utterly discredit both and give neither any weight at all either for or against the plaintiff or defendants, or they were at liberty to believe that the *ex-parte* statement was obtained under duress and by means described in the deposition and in the other testimony, and that the influences and duress having been removed that Brown in giving his deposition had finally told the truth. The jury could not believe both the *ex-parte* statement and the deposition because they cannot be reconciled, and if the statement was to be treated as evidence as well as the deposition, it was the exclusive province of the jury to say what weight should be given to either or both of

these items of evidence, and it was not proper for the Court to say that the statement should be treated "with like effect as the deposition."

It is complained that Judge Thayer incidentally remarked, in the opinion in the Court of Appeals, that no exception had been taken to the charge of the Court upon this subject, and that, therefore, the Court of Appeals was relieved of the necessity of deciding whether there was anything misleading in that part of the charge referring to Brown's statement. The case of Long Bell Lumber Company vs. Stump, 86 Fed. 574, is referred to as holding that no exception to the charge is necessary where a special instruction asked embodying the same principle has been refused and excepted to. We respectfully submit, however, that the general charge of the Court upon this subject is very far from being a mere denial of the proposition contained in said 44th special instruction asked, and that under no circumstances could said 44th special instruction have been given without the clearest invasion of the province of the jury.

There was abundant evidence, independent of any of the testimony of Brown, that the dead body mentioned was that of Hillmon. The case did not at all necessarily turn on his testimony, and we submit that with reference to anything said or done by John H. Brown, that his said written statement, so far as the case related to the identification of the dead body, was only matter of impeachment as to whether he was a credible witness on the question of identity of the dead body, and was not evidence and could not be made evidence for any other purpose in relation to the matter as to who the dead man was, whether Hillmon or another, no matter which party read it.

To enable this Court to understand how the questions and matters relating to that statement and the release respectively arose and appeared and were presented at the trial to the trial court, it will be necessary for this Court to read, among other, the following parts of the record, to-wit: The deposition of John H. Brown, commencing at page 342 (except the parts not read, as shown at pages 339, 340, 341),

particularly pages 436, 437, 457, 458, 459, 472 to 477, 482 to 484, 493 to 519.

And the testimony of Reuben Brown, commencing at page 544.

And testimony of Sallie E. Smith (formerly Sallie E. Hillmon, the plaintiff), at pages 766 to 779, 795, 796, 816 to 830, 1892, 1893, 1898 to 1900.

And testimony of James W. Green, at pages 575 to 597, 1901 to 1904.

And testimony of William J. Buchan, a witness called by the insurance companies, and on and really as part of his cross-examination that statement was read after he had testified on examination in chief for the insurance companies, as shown at pages 1227 to 1250. Also to read page 1269 where he shows he took pen, ink and paper with him to write the statement, after he had been employed and urged to procure the same for the insurance companies, as shown at pages 1246, 1247, 1250 to 1269, 1262.

At pages 1247, 1248, 1250, 1251, 1288, it is shown Buchan was paid $500.00 and expenses by the insurance companies for what he did. (See also pages 1277 to 1288).

The evidence of Buchan conflicts with that of Reuben and John H. Brown and Mrs. (Hillmon) Smith. But from his and their testimony it is, we submit, clear beyond question that Buchan was in the employ of and acted in the matter for the insurance companies, including the plaintiff in error from some time in April, 1879 (see the parts of the record referred to in the stating part of this brief), until and after he obtained the releases, employed to ruin the character of John H. Brown for truth and veracity by procuring that statement, and also to obtain the releases; we submit that by any reading of said statement on such cross-examination, which of course was done as part of the cross-examination of William J. Buchan, not only for the purpose of showing what sort of a document it was, and as to how the releases were obtained, concerning both of which, so as to make such cross-examination proper, he had testified for and as a witness for the insurance companies on his examination

in chief, but also to effect and destroy the credibility of William J. Buchan as a witness because of his obtaining such statement written by himself (r. 1284, 1236), and making such use as he did thereof, on his own showing, and more so if he obtained it as shown by Reuben and John H. Brown, particularly so as to the matters in which he conflicted with any other witness in relation thereto. By procuring and making such use of that statement and the letter by him obtained from Brown, shown in evidence, he put John H. Brown in serious peril and great danger of prosecution for murder, either for killing Hillmon or being accessory to killing some one else. For Buchan to have done that when acting as attorney for Brown, as shown by the cited evidence, Buchan, of course, did that which, as such attorney, he should not have done no matter what the facts were in relation to the killing. But no matter what he should have done, his credibility was affected by his procuring and making such use as he did of that letter and statement.

And we submit that by such reading of the statement on such cross-examination, the defendant in error did not either become responsible therefor, or represent it stated any truth. and by so causing the same to be so procured and used, surely the insurance companies, including the plaintiff in error, became responsible therefor as their paper and statement, prepared by Buchan and signed by Brown as their agents and representatives, to injure defendant in error, and of course they are not entitled to have her held to have represented that the same was true because of so reading it under the circumstances and at the time shown by the record.

And further, the testimony of William J. Buchan being irreconcilably in conflict with that of Reuben and John H. Brown in relation to the manner in which that statement was obtained, and as to whose the statements therein made really were, that is, as to whether the statement was, as we claim, the invention of Buchan as the representative of the insurance companies and therefore the act and invention of the plaintiff in error or was the invention of John H. Brown, that was, of course, an important matter for consideration by the jury. And it was also material whether the statements as to

what John H. Brown told Buchan, as testified to by Buchan in his examination in chief, was true, or whether the testimony of John H. Brown and Reuben Brown on the same subject were true—as to which told the truth in relation to those matters was exclusively the province of the jury to determine—the Court would have invaded that province if it had given the 44th instruction asked, and therefore we submit it was properly refused as well as for other reasons.

Connecticut Mut. Life Ins. Co. vs. Hillmon, 107 Fed. 841.

To properly understand that refused instruction No. 44 (further than as given to the jury), it is necessary to understand and fully appreciate, not only the pleadings in the case, especially the petition, wherein defendant in error stated her cause of action, and the answer of plaintiff in error thereto, especially the general denial and the 3d defense therein, wherein plaintiff in error pleaded to the effect that on the 15th of September, 1879, defendant in error, by her written instrument, released it from the cause of action alleged in said petition (r. 19), and the reply of defendant in error to that answer, particularly the general denial therein of the allegations in said answer, and the 2d and 3d causes of reply specially applicable to the matter of that pretended release—the 2d to the effect that said release was without consideration, and therefore inoperative and void; the 3d to the effect that said release was obtained by fraud and without consideration, stating the facts which constituted the fraud, including, among other things, the matter of plaintiff in error having, by its agents and representatives, procured John H. Brown to make such written statement, therein and thereby making statements contrary to the truth, and such other matters as alleged in said 3d cause of reply, which, as set forth at r. 20–22, is referred to for a description thereof—proof of the fact stated in which petition still left defendant in error barred of her action by the release pleaded in the answer, unless and until defendant in error proved one of the—by her in her said reply—alleged causes for defeating that release. But, and further, for such purpose of understanding

that instruction, it is also necessary to understand not only the deposition of John H. Brown therein mentioned, but also the evidence of many other of the witnesses in the case, including that of William J. Buchan, Robert Brown, James W. Green, and defendant in error, so far as the same respectively relate to the matter of that written statement and the release pleaded, and the "Munn paper," mentioned in the 31st and 59th assignments of error, as well as much more of the evidence—all which is explanatory of *why* and *how* plaintiff in error procured that written statement and the use it made thereof, and *when* and *why* it was read in evidence—not to prove it or anything therein stated was true, but to prove the contrary, and to show what kind and sort of a document and *instrument* that written statement was, and by procuring and using which as it had done, plaintiff in error had wrought and accomplished such wrong and injury to defendant in error as alleged in said reply.

The common knowledge of all men teaches there are more ways than clubs used by thugs, or doses by the Borgia or their prototypes, to overcome a victim with, yet the fact of the existence of that written statement coupled with the open threats to use the millions of the insurance companies, and the open threats as to what Buchan and Brown would do, added to what took place at the Planters Hotel on the 15th of September, 1879, when defendant in error came into the condition she did before signing the release, might well have been, and become, the equivalent of an iron mace brought down upon the capacity of defendant in error to act for herself, think, reason or understand what she was doing, or the effect thereof, when, without reading or knowing its contents, she signed the release because Buchan told her to, as shown at r. 772–3, 822–3.

And if the instrument used to get her into such condition had been a bar of iron applied vigorously to the seat of her thinking organs, and if in such case such instrument had at the time when the written instrument was read to the Court and jury been shown in evidence, no one, not even plaintiff in error, or its representatives, would be found hardy enough to claim she might properly and ought there-

fore, that is, because she so showed such instrument in evidence, be again struck therewith; yet we submit the present claim of plaintiff in error made by asking the Court to give that instruction No. 44, is equivalent, and not at all less, than it would be to ask the Court in such other case to cause her to be again struck by such mace or bar of iron, because she placed it in evidence to help show what she was struck with to help get her into such condition as she was in when the release was obtained from her, and why did plaintiff in error, through Buchan, its agent, refer to its millions, as shown at r. 771, 500, A. 36, in connection with his assertion that defendant in error could not recover if she sued on the policy (r. 771, 821–2) unless it was to turn her mind to a contemplation of what as matter of common knowledge frequently disseminated through the public press and otherwise, all consider may be done with use of money, to prevent unanimity in a jury, or otherwise to obstruct a due administration of justice (and there were four juries that failed to agree), and because of those threats, a question naturally arises as to whether the equivalent of the $500 and expenses paid Buchan for his doings (r. 1247–8) operated to help hang these juries.

And we submit that because of the matter of the employment and payment of Buchan for what he did raises a presumption that his employers would do anything that could be done with their money, which they, through him as their agent, bragged of, as shown by the herein referred to evidence (r. 771; 500, A. 36; 473–4), and it should be borne in mind at all times that it was plaintiff in error through its agent, Buchan, that introduced this matter of *its money power into the case* to convince both Brown and defendant in error of the futility of trying to cope with it in the courts—all of which, when considered in connection with her condition, amounting to incapacity to act for herself, shown by what she did at the latter part of the interview at the Planters Hotel, and then going and doing for so long as Buchan wished, as shown by the evidence before referred to in relation to the matter of that release, was, we submit, enough to sufficiently prove that said written instrument, coupled with

what was said and done at that interview, was used on and against her as the equivalent of a club, and might be put in evidence to help show how she was hurt, without giving cause for *hitting* her again *therewith*, as requested by said refused instruction No. 44.

And if a party will through its agents thus *threaten* to use *its money*, or will *ratify acts* of *its agents done* by help in part of such *threatened* use thereof, it should not escape just consequences of so doing, or object to such matters now being shown.

TWO SIDES AND POINTS OF VIEW TO THE QUESTIONS INVOLVED IN THAT REFUSED INSTRUCTION No 44.

On the one side of that question, supported in favor of the defendant in error by a great preponderance of the testimony, among other evidence, was the testimony of Reuben Brown and John H. Brown and part of the testimony of William J. Buchan, tending to prove, more proving, not only *prima facie*, but beyond any reasonable doubt, that as between plaintiff and defendant, the written statement was the production and invention of plaintiff in error through its employees including Buchan (paid for so doing [r. 1262, 1247–8, 1288, etc.]), by it thus manufactured *as a weapon offensive* and *defensive*, with help of which used either way, improperly to work and do defendant in error wrong and injury. All which side and point of view of that question would by giving that instruction No. 44, have been for all practical purposes ignored by the Court, and the jury directed to disregard all that testimony, and to find their verdict on the basis that the written statement was read in evidence for the purpose only of proving that the matters therein stated were true, instead of being put in evidence as it really was to show among other things what sort and kind of a *bludgeon* plaintiff in error by its agents had procured, invented and manufactured with which to strike at her rights, injure and suppress and destroy testimony favorable to her and to help wrong and injure her, as alleged in her reply.

And surely it was not proper for the Court, because of being so requested by the plaintiff in error, as done by that refused instruction No. 44, to ignore the referred to testimony of Reuben Brown and John H. Brown, or said part of the testimony of Buchan, or assume that defendant in error, or Brown, testified falsely in reference to the matter of the procuration of the release or of the written statement, or as to the use made of the fact of its existence, as it would if it had given that instruction, or to ignore the question as to whose written instrument that was, that is, whether it was not more that of plaintiff in error than of Brown, as between plaintiff and defendant, as that also was a question for the jury, as is shown by said deposition and the other evidence bearing on that question, including that of Buchan, by whom, as its employee plaintiff in error procured both instruments, and for doing which it paid him, and then by pleading the release made all that Buchan said and did in the matter its act. And now in relation to the matter of that instruction, let us consider the deposition and some other of the testimony and the issues in the case.

The deposition of John H. Brown in that refused instruction No. 44 mentioned was taken at Wyandotte (now Kansas City), Kansas, about January, 1882, in pursuance of a notice to the opposite party (r. 341), in one of the cases tried, and an agreement referred to at r. 318, that the same might be read in the other case, etc., under the sanction and solemnity of an oath duly administered (r. 342, 520), a violation of which oath on the part of Brown would have subjected him among other things to the pains and penalties of perjury under Section 5392, page 1045, R. S. 1878, whilst said written statement (r. 1284) was taken secretly, as to defendant in error, and without notice to her, and was a mere *ex parte statement*, and although in form of an *ex parte* affidavit, was not in law or legal effect sworn to in any legal proceeding or under such circumstances as to render Brown liable under said Section 5392, or William J. Buchan, who, according to his own testimony, wrote the same in his own language (r. 1236, 1269, 1270, 1283–4) and went to Parkville where it was so sworn to for the purpose of having that done (r. 1270), liable to the

pains and penalties of subornation of perjury under Section 5393, page 1045, R. S. 1878, even though both he and Brown at the time knew and believed (as elsewhere shown) such written statement to be false, as Buchan well understood when he procured that statement in the manner herein shown, and so in substance informed Brown when and before that statement was made. (R. 473, A. 1295; 457–8, A. 1224.)

And when said deposition was so taken the insurance companies, including plaintiff in error, had opportunity to cross-examine Brown, which was exercised by the attorneys who signed the aforesaid answer for plaintiff in error (r. 19), as shown at r. 349 to 493, by asking him 1490 questions, and further as shown at r. 509 to 520, by asking him 147 more questions—altogether 1,637 questions.

At the taking of that deposition John H. Brown was called as a witness by defendant in error, and on his examination in chief, as shown at r. 342 to 349, he testified among other things to the effect that on the 17th day of March, 1879, in a camp on the banks of Crooked Creek, in Barber County, Kansas, he accidentally shot and killed John W. Hillmon (r. 345–6, 344) where they had camped, without any one else (r. 344, A. 44), on a trip they, unaccompanied by any other person, had made from Wichita, starting on the 4th or 5th of March, traveling by way of the route described at r. 344, A. 37–8–9 and 40, being made for the purpose of finding and locating a stock ranch suitable with range and water, without getting too close to farmers around on the creeks. (R. 345, A. 80; 344, A. 33.)

And thereupon after having so testified Brown was cross-examined, as shown at r. 349 to 493, by the aforesaid attorneys for plaintiff in error and other insurance companies, in which cross-examination in answer to questions asked him by those attorneys, he in that deposition reiterated that he so accidentally shot and killed Hillmon (r. 408, 411, 415, A. 762 and 756; 420–1, 423, A. 855) on such trip made only for the purpose of locating such stock ranch for Hillmon (r. 381, A. 398 to 401) and going alone (r. 393, A. 541), which going alone was corroborated by other evidence as follows: Julius

Draves, r. 1412, 1413, A. 62, 64, 68, 69, 70; Michael Mesh, r. 1562; Ben Helda, r. 1574; Updegraff, r. 665; Eli Smith, r. 662; Byerly, r. 656–7; Priest, r. 673).

And on such cross-examination, Brown further, among other things not material to consider in connection with the matter of the written statement, testified to the effect that on the trip on which Hillmon was so killed, he and Hillmon about the 4th of March, 1879 (r. 392, A. 524) with a team, wagon, and appropriate outfit for such expedition, started *alone* from Wichita on the road to Medicine Lodge and camped the first night at a place called Elm Creek or Cow Skin and remained there two or three days, and then left on said road and camped the first night thereafter at a regular camping place about two miles south of Kingman on said road 30 or 40 miles from Wichita (r. 392–3–4, A. 524 to 553).

And that on the first day's travel and about three miles out from Wichita another man got in company and went and rode with them from there to said Elm Creek or Cow Skin and staid with them whilst there (r. 393–4, A. 542–3–4), and who left them about noon of the day they left that camp and Brown, did not ever see him either before or afterwards (r. 502, A. 53 to 56; r. 399, A. 620–1), and that from that camping place 30 or 40 miles from Wichita they, Hillmon and Brown, by an appropriate route for persons looking for such location for such ranch, travelled several days until they arrived at Medicine Lodge (r. 394 to 397), where they (Hillmon and Brown) met some people who knew them, and then saw them there alone, that is, without any third person with them, as shown by the testimony of Updegraff, r. 665; Eli Smith, r. 662; Byerly, r. 656; see also the testimony about the dead body being recognized as that of Hillmon by them and several other witnesses who had before met and knew Hillmon and Brown at Medicine Lodge, referred to in the statement part of this brief under the heading of "IDENTIFICATION OF CORPSE AS HILLMON'S," and leaving there they were seen without any third person as they passed along the road by Byerly as they passed out of Medicine Lodge (r. 655 to 661), and by Priest as they were on the route further along (r. 673) to where Hillmon was so killed;

and from Medicine Lodge they continued on to where they, Hillmon and Brown, camped close to a farm house (r. 399) and remained there at the first camping place after they left Medicine Lodge over night (r. 405, A. 632), and proceeding, that they camped the next night 2 or 3 miles from Sun City (r. 405, A. 634–5), and camped there 2 nights (r. 406, A. 640), three persons (themselves and another) staying one night there (r. 405–6, A. 639), and from that camp they went a day's drive in a northeast direction and camped on a little stream called Crooked or Spring Creek (r. 406, A. 642) where Hillmon was so killed (r. 408, A. 680; 415, A. 762), and that when Hillmon was so killed Brown went and got Mr. Graves who lived half or three quarters of a mile from that camp (r. 418, A. 780), who came back to the camp where Hillmon lay dead (r. 418, A. 779, 781), who, that is, Mr. Graves, was the same man who had been at their said last camp during the day Hillmon was killed (r. 419, A. 799, 800; r. 408, A. 676–7–8–9); and then an inquest was held at that camp (r. 419, A. 801) and the evidence shows another inquest was held at Medicine Lodge (r. 324, 346) and another at Lawrence, as shown at r. 594–5, 429 and elsewhere, at all of which the evidence shows Brown testified.

And on re-examination of Brown by counsel for defendant in error, Brown in that deposition further reiterated some of the testimony given on his cross-examination, and testified among other things to the effect that the man who rode with him and Hillmon in the wagon, from two or three miles out from Wichita on such second trip, remained with them about two and one-half days, which, as they stayed two nights at first camp out of Wichita, shows he left them before their next camping place, and that he (Brown) had not ever seen him since (r. 502, A. 53 to 56), and that the man who stayed with them in their camp near Sun City came late in the evening and went away early the next morning, starting toward Sun City, and that Brown had not ever seen him before or since then (r. 502, A. 57, 60), and that John W. Hillmon did not vaccinate any person on that trip, and not the stranger who rode a few miles with them near Wichita (r. 503–4, A. 70 and 71), and that he (Brown) did not tell Buchan that

Hillmon vaccinated that stranger or man, but that Buchan suggested the idea of vaccination of such stranger (r. 504, A. 72–73), and that there was no other person than the two before mentioned in the camp of Brown and Hillmon at night, traveling with them during the trip from Wichita, (r. 504, A. 74), and that Hillmon did not trade clothing, or any article of clothing, with any person during that trip (r. 504, A. 75), and that he did not state to Buchan that Hillmon traded clothes, but that Buchan suggested putting such a STATEMENT into the paper, the statement of 4th of September aforesaid (r. 504, A. 76–77), and that he (Brown) did not ever have with Hillmon and Levi Baldwin, or either of them, or with any other person prior to the time he and Hillmon started in December, 1878, any conversation about the matter of insurance on the life of Hillmon, and that he never had any such conversation at all, and never heard them or any one else say anything about any such insurance, until at Medicine Lodge, on the first trip, he became acquainted with the fact of insurance through a letter received by Hillmon from Lawrence, from an insurance agent (r. 505–6), (which insurance letter was probably the application of 24th of December), and that he first learned of the amount of insurance after Hillmon was dead (r. 506, A. 85).

And on such cross-examination as first aforesaid, Brown further testified to the effect that Buchan wrote the statement, in said refused instruction No. 44 mentioned (r. 440, 479), as to which he was corroborated by Buchan, who, among other things, testified to the effect that he wrote the same in his own language (r. 1236–7, 1261, 1269, 1270), and after, that is, that Buchan so wrote the same after he (Brown) had time and again told him (Buchan) that he killed Hillmon, and could not help it (r. 405, A. 630; r. 473–4, A. 1298).

And further, in and by that deposition, on such cross-examination, Brown, in answer to further questions asked him by the aforesaid attorneys for the insurance companies, testified to the effect, and proved, so far as testimony given by him could prove, that said written statement of 4th September, 1879, was false (r. 418, A. 777), (and reiterated on re-cross-examination) (r. 519, A. 130), and that he did not

tell Buchan such things as therein stated (r. 436–7, 405, 441–2–3–4–5–6–7–8–9, 450, 452–3, 472–3–4, 477, 478, questions and answers 630, 1059, 1060, 1112 to 1146 and 1175, 1176, 1184–5–6, 1294 to 1299, 1332, 1346 to 1350), including that he (Brown) did not ever tell Buchan that Hillmon was alive, or that he (Brown) had not so killed Hillmon, but on the contrary did, time and again, tell Buchan that he (Brown) killed Hillmon accidentally (r. 404–5, A. 630; 436–7, A. 1059; 1068–9; 473, A. 1298).

And several of those questions so asked Brown and his answers thereto on such cross-examination as aforesaid, including No. 1224 at r. 457–8, Nos. 1294 to 1299 at r. 472–3–4, No. 1332 at r. 477, and Nos. 1346 to 1350 at r. 478–9, as copied in the statement part of this brief, and other herein referred to parts of his said deposition are here referred to, to show, and he (Brown) on such cross-examinations thereby testified to the effect, that Buchan *invented* and *manufactured* that written statement himself, because he (Buchan) wanted to get a statement from Brown to make it appear that it was not Hillmon who was killed but someone else, to get what Buchan considered big money out of the insurance companies (r. 473, A. 1294) for a document statement which he (Buchan), being a lawyer, could plan (r. 474, A. 1298) and could make so easily (r. 474, A 1299), and that if Brown would consent to let him (Buchan) do it, it would not take him a great while (r. 477, A. 1332), and induced him (Brown) to sign and swear thereto on the assurance of Buchan as a lawyer, and understanding that such swearing was not lawful, and that he was not (thereby making) throwing himself liable, and that it could not be used in law (meaning, of course, not perjury within the meaning of the aforesaid Section 5392). (R. 473, A. 1295; 479, A. 1347; 457, A. 1224.)

And that although he (Buchan) and everyone he knew [unless he excepted the insurance company men (r. 473)] believed his (Brown's) previous statements (meaning Brown's statements, testimony at inquests and proof of death to the effect that the aforesaid dead body was that of Hillmon, and that he accidentally killed Hillmon) to be true (r. 473), yet that the insurance men would not pay any attention to what he

(Brown) said, and as his lawyer, threatened Brown in language under the circumstances practically equivalent to an assurance that beyond any hope of defense he (Brown) would be arrested, put in jail, tried for murder (Brown had himself sworn and stated that he killed Hillmon) and sent to the penitentiary unless he (Brown) consented that he (Buchan) should write out for Brown a *false* statement to make *it appear* that it *was not* Hillmon he (Brown) had killed, but someone else, and that if *he did so* THEN the insurance men *would be satisfied;* OTHERWISE, having the money to do it with, they would hunt him (Brown) down and make him out a murderer, etc., and that they had the money to do it with, and as to its (such false statement) not being true it did not make any difference at all, as it was not lawful (not perjury, etc.) and that it would be better to allow him (Buchan) to write out *such false statement* than to be arrested, put in jail and probably go to the penitentiary, and that if he would, he (Buchan) would stand between him and all danger, and that he (Buchan) had been keeping the insurance men off, but could do so no longer, and that it was *then* or *never*, that Ward, the deputy sheriff, would probably take him (Brown) then (r. 457–8, A. 1224; 477, A. 1332; 472–3–4, A. 1294 to 1299; 478–9, A. 1346 to 1350).

And then Brown, *frightened* (as Buchan exultingly informed defendant in error, as shown at r. 771), gave in, and that (so as herein shown to be false) statement was written (r. 458, 479, 1236).

WRITTEN STATEMENT WHY AND HOW PROCURED BY PLAINTIFF IN ERROR AND OTHERS.

Said written statement was by plaintiff in error, and the other interested insurance companies, by its and their agents and representatives, including William J. Buchan, procured from John H. Brown wrongfully, as shown by evidence herein cited.

In this connection we request attention to said deposition and other testimony in the case which proved that said written statement was procured for the improper purpose of suppressing, and to destroy evidence favorable to defendant in error, including injuring and destroying the character of John H. Brown for truth and veracity, as well as with help thereof to obtain a surrender from defendant in error of the policies or the then supposed equivalent of such surrender, releases thereof, and thus to wrong and injure defendant in error.

And in relation to that matter we here refer, as though here repeated for the purpose of this part of our argument, to what we have said and to the references to the record we have made in reference to assignments of error Nos. 27, 28, 29, 30 and 32, and Nos. 31 and 59; and in the stating part of this brief in relation to what occurred from the time of the accidental killing of Hillmon on Crooked Creek in Barbour County, on the 17th of March, 1879, until Buchan met John H. Brown at Lexington, Missouri, about the 3rd of May, 1879, and to what occurred thereafter until the releases were obtained, and said statement torn and thrown in the stove used as a waste basket in the office of Buchan on the 16th of September, 1879, when Buchan supposed said written statement had performed the services required, and answered the purposes for which it had been obtained, as shown at r. 1246, 1276.

John H. Brown and John W. Hillmon, having, as before shown, traveled together from Wichita by an appropriate route for one seeking a location for such ranch as afore-

said, to a place where Hillmon was so accidentally killed on Crooked Creek, and none other being present when Brown so accidentally killed Hillmon, he (Brown) was of course an important witness, and if his character for truth and veracity could be destroyed, and thus defendant in error be practically deprived of his testimony, and of the use and value thereof as a witness, to prove when, where and how Hillmon came to his death, it appeared to the representatives of plaintiff in error, and of the other insurance companies, that a great point and gain would be thereby made and gained by the insurance companies, through them as against defendant in error in any effort of hers to recover on the policies, and that we submit explains why Messrs. Buchan, Barker, Green and Munn did what they did as they did to procure such written statement—and among other things plaintiff in error, through Walker, etc., having got the father of Brown and Buchan together as before shown, and Buchan started to acting, pretendedly as attorney for Brown, he (Buchan), as shown by the evidence of Reuben Brown, set forth at r. 544 to 575, obtained the assistance of Reuben Brown to assist him to get a statement from John H. Brown *different* from what he had made, as shown at r. 548, 473–4, as Brown had before testified at the several inquests held in Barbour County and at Lawrence to the effect that the aforesaid dead body was the corpse of Hillmon, such desired and *different* statement could only have been such an one in substance and effect as the aforesaid written statement, and in the hope of getting from John H. Brown substantially *such* as said written statement, Buchan and Reuben Brown about the 3rd of May, 1879, (r. 436, A. 1055–6) went to Lexington, Missouri, and there saw and interviewed John H. Brown, and endeavored there to obtain from John H. Brown the equivalent of such as said written statement, but failed, Brown telling Buchan he had before told the truth, and that he had so accidentally killed Hillmon, and that said dead body was the corpse of Hillmon (r. 548–9), and that he (Brown) had done what he had and could not help it, and that he had before told the truth (r. 474). Buchan finding Brown wished to go to his brother Reuben's place

(r. 474) tried to induce and scare Brown to go farther away (r. 474, 550), but Brown knowing his innocence of any crime and not fearing or hesitating to be where he was well known, as shown by his acts, did return to Reuben's place near Parkville, not far from Kansas City.

Buchan, within a day or two after his interview with Brown at Lexington on 3d of May —which would have been the 4th or 5th of May, 1879— went to Lawrence to further communicate with other representatives of the interested insurance companies (r. 1222–3, 1253–4, 1256, 1260), and from that time on until the whole scheme of undoing Brown as a credible witness against those insurance companies, and of getting the releases from defendant in error had been accomplished, Buchan was, as occasion seemed for the purposes of such scheme to require, in communication with representatives of the insurance companies, including Messrs. Barker, Green and H. B. Munn (r. 1254, 1256, 1259, 1260–6); Barker at Buchan's office, in Wyandotte, once or twice (r. 1260); Green at Buchan's office two or three times (r. 1261–2–3); and Buchan, having received a letter from either Barker or Green, asking him to meet them at the Coates House in Kansas City (r. 1255–6), did so (r. 1256, etc.) twice (r. 1268), and there Messrs. Barker and Munn informed Buchan that Brown had made proofs of death (meaning, of course, that Brown had made affidavits that the aforesaid dead body was that of Hillmon (r. 1258), and then they wanted Buchan to go and see Brown and find out about it, and see what Brown was going to do about it (r. 1258, 1261, 1268), and what he (Buchan) was going to do (r. 1258, 1261–2, 1268), and promised to, and did, pay him (Buchan) (r. 1262)—(see also r. 1247–8, 1288, where it is shown that the plaintiff in error and the other insurance companies paid Buchan for all he did)— this last interview on the 3d of September, 1879 (r. 1268), and thereupon the next day (September 4th), Buchan having made up his mind, and to show what he was going to do, took Ward, a Deputy Sheriff of Wyandotte County, Kansas, with him, and who remained with him until he had got the written statement (r. 1291, 1281, 1234, 1238, 456, 571, 417, 439, 478, 479, 551, 553, 554); and also pen, ink and paper with which

to write such written statement as was desired with, with him (r. 1269), and a team and buggy (r. 1291); he (Buchan) went and found Brown at Reuben's place, engaged in honest labor (r. 439, 551), notwithstanding the previous unsuccessful effort of Buchan to get Brown to go farther away (r. 474, 550), and of an effort of Wiseman, at the time of the Lawrence inquest, to run Brown off (r. 1852–3–4); and then Buchan and Ward, with a team and buggy, went to where Brown was working and brought Brown to Reuben's house (r. 551, 474, 568)—from which time we see from other parts of the evidence referred to herein (particularly at r. 502, A. 50), Brown and Buchan both considered John H. Brown as practically under arrest, held and bound to do as Buchan wished him to, including signing and swearing to said written statement, until after the releases had been obtained from defendant in error.

And he (Buchan) making use of such threats, arguments and inducements, as shown in the statement part of this brief and by Brown's deposition, and elsewhere herein, induced Brown—practically by coercion and duress of Brown—to sign and swear to that written statement which he (Buchan) wrote in his own language (r. 1236–7, 1261, 1269, 1270), he (Buchan, attorney of Brown), when and before he wrote the same, knowing that Brown had, at inquests held in Lawrence and Barbour County, previously sworn that the aforesaid dead body was that of Hillmon, and had made the aforesaid proofs of the death of Hillmon (r. 1258, 1264, 1238, 1288, 575, 427), without knowing of any evidence against Brown, his client, other than what he (Buchan) himself claimed to have obtained from him in relation to the matter (r. 1264); and after John H. Brown had made to him (Buchan) such statements, as shown by the aforesaid deposition of John H. Brown, and by the testimony of Reuben Brown, hereinbefore referred to—some thereof in the statement part of this brief—the falsity of which written statement is also further shown by the reference therein to the name Berkeley or Burgess (r. 1285), coupled with the testimony of the aforesaid agent of the insurance companies, Theodore Wiseman (r. 854), who, as shown at r. 903–6–8, testified to the effect that the repre-

sentatives of the insurance companies acting in the matter were proclaiming that the dead body was the corpse of one Joe Burgess or Nichols—which proclamation we hereinafter see was wrong and amiss, to the great injury of any pretense that said written statement was made as a truth-telling document.

And having obtained that written statement Messrs. Buchan, Barker, Green and Munn met at Lawrence, Kansas, and there Munn, as agent for plaintiff in error and the other companies, gave to Buchan the written paper dated of the 6th of September, 1879, mentioned in assignments of error No. 31 (r. 1947, 580), and No. 59 (r. 1955, 835), and informed Brown thereof and explained the same to him, including of course the exception therein (r. 1297, 1290), and Buchan was, by the other agents of the insurance companies, then further employed to procure the releases and promised payment therefor, and payment for his expenses in any event, as shown at r. 580, 581, 592 and elsewhere.

William J. Buchan was the principal active, acting agent of plaintiff in error, in the matter of so procuring each said written statement and release respectively, and after Buchan had from Brown procured said written statement, as herein shown, he (Buchan) with the help of Brown, on the 15th of September, 1879, at the Planters Hotel, in Leavenworth, Kansas, procured from her said release by such improper, wrongful and fraudulent representations, actions and methods, as alleged in said reply, and as shown by the evidence set forth at r. 770 to 778, 818 to 824, 512 to 520, Buchan there admitting, said dead body was that of Hillmon, and she there asserting that the same dead body was that of her husband, John W. Hillmon (r. 770, 820–1; 517, A. 115; 518, A. 119), at first refused to give up the policies (r. 770, 820–1), but she being sick, having a headache and fever, *did not take dinner* further than to drink a cup of tea Buchan brought her (r. 771), after which she being *overcome* and *sick* and her *capacity* to transact business *gone*, she signed the releases without *reading* or *knowing* what the same were, as herein elsewhere shown, *because* Buchan *told her to*, and thereafter for a long

time did as he told her to, until she came to herself again, as herein elsewhere shown, all as alleged in said reply.

And plaintiff in error itself, by its witness (r. 1227) and agent, Buchan, informs the court and jury that said written statement was procured for such purposes as in said reply alleged and herein claimed, including that of, with help thereof, and of the fact of its existence, procuring the release (r. 19) from defendant in error by the testimony of Buchan, shown at r. 1246, 1276, to the effect that on the day after that release was obtained he tore up the written statement and threw it into a stove in his office, used as a waste basket, with remarks of his to the effect that he *guessed* it was all over and that he would tear it up.

WISEMAN, BUCHAN, JOE BURGESS THEORY.

(Which when exploded, supplemented by the misfitting, afterwards exposed, Walters theory.)

In this connection, as an important matter of evidence relating to the question as to whether said refused instruction No. 44 should or should not have been given to the jury, we request further attention to the clause in said written statement about "Berkley," or "Burgess," called "Joe," Joe "Burgess" or "Berkley," shown at r. 1285–6, and the testimony of the some time detective, Theodore Wiseman, mentioned in the testimony in the case, who, as hereinbefore shown, was at the grave in Barbour County when Hillmon was first exhumed, and who telegraphed Griffith, as referred to in the statement part of this brief, and who tried to get A. J. Phillips to scare John H. Brown into running away, as shown at r. 1851 to 1854, and who appears to have been active in the matter of working up the so-called Walters theory, as shown at r. 878 to 881, 887–8, and elsewhere, as shown in the argument in relation to the matter of the Walters theory. Said Wiseman, a witness called for plaintiff in error, testified to the effect, as shown at r. 903–6–8, that he was for a time working on the theory that one Joe Burgess might be in-

serted in the case as the original of the aforesaid dead body, but finding that he was alive and could be shown (r. 903), he (the detective) quit advocating the Joe Burgess theory (r. 903). It is of course appropriate to inquire why the name, Joe Burgess, etc., was used in that written statement, and we submit that it is clear beyond question that it was because of the Wiseman theory about Burgess, referred to at r. 903, etc., before Burgess was found to be so much alive that he would not keep out of sight communicated to Buchan through Munn and others, when they employed him as before shown (r. 1262, etc.) to obtain that written statement, as being a good name to insert therein, when he so took pen, ink and paper with him with which to write the same (r. 1269), as being the name of the man who was with Hillmon and Brown a short time on their trip, Brown having doubtless, when being sweated in the office of Barker, as shown at r. 371–2–3, 375–6, 397, and elsewhere, mentioned the fact of a man having been for a short time with him and Hillmon on the trip, but who as we see from said deposition did not camp with them after their first camp out of Wichita, and who was not, after about noon of the first day after leaving that first camp, ever seen by Brown. (R. 502, A. 53 to 56.) It is certain that if when that statement was written by Buchan he had known that Joe Burgess was not in fact dead, but would soon show up alive, he would not have inserted Burgess' name in said statement to describe the invented victim. Now, if said refused instruction No. 44 had been given, who were the jury to pick out to fill Joe Burgess' missing place in that written statement, and we ask could that written statement be of any force when, in connection with the testimony of Wiseman, shown at r. 903, it was utterly false and untrue so far as Joe Burgess was concerned? And we contend the only legal answer to that question is *No*, and we contend the maxims of the law require such answer, except that it might and ought to have been shown to the jury for the mere purpose of showing what sort of a thing it was that plaintiff in error procured with which as a weapon to hit defendant in error and her case. And this circumstance of the name of the pretended murdered man being inserted in the Brown state-

ment is one of those little bits of internal testimony that almost always can be found in *false statements* which demonstrate their *true character*. At the time Buchan was preparing *this falsehood* he doubtless thought it exceedingly clever to give the tale an air of circumstantiality by stating the name of the pretended victim, and that very statement is one thing in the vicious instrument that demonstrates it to be what John and Reuben Brown testified that it is, namely, a *false statement*, manufactured by plaintiff in error and its assistants, by Buchan, its and their paid agent, for his, its and their own purpose, and which he frightened John Brown into signing.

And so far as that part of the matter is concerned, we submit that if that refused instruction No. 44 had been given, more confusion would have been uselessly and erroneously added to an already and otherwise established falsehood, so far as that written statement was concerned, and we submit a verdict ought not to have been found, or the jury told they could find a verdict, on the supposition that a living man could be considered as the referred to corpse; but Joe Burgess was found by Wiseman to be still living and they gave up that claim (r. 903–6–8), but *too late* to *invent* and *place* in that written statement any *other* name than that of "Berkeley" or "Burgess," called "Joe" in the connection therein used.

The "statement" referred to in said 44th special instruction, and which plaintiff in error requested the Court to charge, should be considered "with like effect" as the deposition of John H. Brown contained an assertion that the person killed by Hillmon and Brown was Joe Burgess; yet the evidence is clear that Burgess was not killed, but was afterwards found alive, this fact being proved by the testimony introduced by the plaintiff in error. It follows that the most essential fact contained in this statement was absolutely and confessively false. And surely the trial court could not, with such undisputed testimony, given by a witness called by plaintiff in error, before it, have properly given that instruction No. 44, which as worded did, and if given would, include a proposition to the effect that the jury might find that the still living "Joe Burgess" was such victim, as stated in that

written instrument, there being no competent evidence in the case indicating he was or might be dead.

And further, we submit that to have instructed the jury that said statement in reference to the killing of Joe Burgess might be treated with like effect, as the deposition of John H. Brown, which contained many matters that were admitted to be true, would have been *equivalent* to instructing the jury that the deposition *should be* treated as wholly false. And further, a piece of evidence which was *confessedly false* in its *essential feature*, should have been considered false *entirely*, in accordance to the legal maxim to that effect, and should not have been submitted to the jury with instructions to treat it "with like effect" as another piece of testimony, the deposition, which in part stood admitted to be true and not in any manner denied, and which the defendant in error was insisting, and still insists, was wholly true.

And if plaintiff in error shall ask the Court to consider the *misfitting* Walters *theory* as a *substitute* for the *collapsed* Burgess theory, then we ask the Court in such connection to consider what we urge with reference thereto in our response to the 74th, to 77th and 84th assignments of error, from which, and the evidence there and in the statement part of this brief referred to, it will be seen that although the Walters theory was a *second* and *substitutive invention* and should *therefore* have been *an improvement*, yet that *in fact* it is at least an equally, if not more, apparent abortion than its predecessor, each *utterly* ruined by the continued appearance *among* the *living* of both Walters and Burgess, as well as the Walters theory being spoiled by other misfitting and evil qualities thereof; all this from inherent defects in each of those theories, irrespective and independent of the large preponderance of the testimony, which affirmatively showed the dead body was that of Hillmon.

ESTOPPEL.

That plaintiff in error is estopped from any right to ask the Court to give that refused instruction No. 44, because of the wrongful acts, means and methods used by it and its assistants to procure said written statement, to the damage of defendant in error, is, we contend, shown by the rules and maxim to the effect than no one "shall have advantage from any wrongful act or conduct done by or for them, or by one whose wrongful acts they are or have become responsible for, either because of previous employment or subsequent adoption or ratification, either by paying therefor or by accepting supposed benefit arising therefrom, or from a series of acts, of which those that were wrongful constituted a part;" and on this matter, to avoid repetition, we refer to what we urge on that subject in relation to the matter of the Walters' theory, made prominent in the case by the 74th to 77th and 84th assignments of error.

And it is no answer to this matter of estoppel to say that Buchan swore as a witness to the effect that Brown made the written statement "just because he wanted to"—because in addition to the fact that by his own testimony Buchan concedes to the effect that he procured the written statement by wrongful means, including because of being *hired* by plaintiff in error and its assistants *to do as he did* by and with his client, Brown.

And there is also the rule of law that the Court should not ignore the testimony of John H. Brown and Reuben Brown (corroborated to a great extent by some of the testimony of Buchan), to the effect that Buchan by *wrongful conduct procured* the written statement, as it would have done if it had given that instruction No. 44, and thus given plaintiff in error benefit and advantage from and because of all the wrongful acts and things done and said to procure that written statement, to the injury of defendant in error; and even if plaintiff in error would have been entitled to that instruction, if there had been no testimony conflicting with the most, to plaintiff in error, favorable part of the testimony of Buchan (which we deny), still, because of such opposing testimony,

which the Court would have ignored and in effect told the jury to disregard, whether they believed it or not, if it had given them that instruction, the Court would have erred if it had given it.

And plaintiff in error was not entitled to work such an *estoppel* against consideration by the jury of such evidence of John H. Brown and Reuben Brown by or because of anything that Buchan could utter after doing the wrongful things he did to and by his client, to the injury of defendant in error, for the money of plaintiff in error and its assistants, as it would have done if that instruction No. 44 had been given.

But on the contrary, it was the duty of the Court to leave the testimony of Buchan and of each Brown for the consideration of the jury, so far as the same related to the matter of that written statement.

Issues Made by the Pleadings and Why the Deposition Was Read in Evidence, and Why and For What Purpose and Under What Issue the Written Statement Was Read, Including That Said Written Statement Was Not Read as Being True, or as Containing any Truthful Statement, but on the Contrary to Show that it was such Statement in Writing as Plaintiff in Error, by its Agents, had Procured Brown to Make, Including That it Was a Document Containing and Consisting of Statements Exactly Contrary to the Truth, as Alleged in Said Reply.

Whilst defendant in error by reading so much as she did of that deposition in evidence thereby represented John H. Brown as being a credible witness, however much his credibility was affected by that written statement, and whilst she also read so much of that deposition, as she read, as and for testimony tending to prove, and to prove, that the truth

was and is in accordance to the testimony of Brown therein set forth, including among other things, that he accidentally shot and killed Hillmon on Crooked Creek in Barbour County, Kansas, on or about the 17th day of March, 1879, and also that he (Brown) was procured by plaintiff in error and its agents (Buchan and the other representatives of plaintiff in error, who employed and induced him to get that written statement) to sign said written statement for the purposes and as in the aforesaid reply alleged (r. 20–1–2), and that said reply, particularly the allegations in the 3d subdivision thereof is and were true, *which involved* the *proposition* and *fact* that said written statement was *false* and *untrue* in every respect material to the case, and that the same said written statement was obtained and made and the fact of its existence used, for the purpose of wronging and injuring her as in that reply alleged, including to procure from her the aforesaid release (r. 19) fraudulently and without consideration, and by reason and means of such false representations made under the circumstances and as in said reply alleged, yet she did not thereby affirm or represent that every statement made by him on other occasions, certainly not such statements as may have been made by him while under the influence of threats or fear or duress, applied by plaintiff in error through its agent, Buchan, were also true.

And from, by and because of said reply, and the allegations in the 3rd subdivision thereof, plaintiff in error knew, had notice and was informed that defendant in error would and did so read that written statement, *not as being true*, or *to prove* that the facts were as therein stated, but on the contrary to show that the same was contrary to, *and the opposite of the truth*, according to the substance and meaning of the allegations in the said 3rd subdivision of that reply, and as therein alleged, and that the same, and the fact of its existence having been made use of as alleged in that reply, show that thereby, and by and because of the false and fraudulent representations in that reply alleged she had been wronged and injured, and caused when sick and in such condition as therein alleged to sign the release without consideration, and we submit that any argument or pretense that defendant

in error read said written statement in evidence to show or prove that it or anything therein stated was true, or that it was read for any purpose other than to show what it was, that it was such a writing as in said reply alleged, is the merest sophistry.

To further understand the situation, when that written statement was read in evidence, and the objects and purposes for which the same was competent and could be then read in evidence without making the same or any of the contents thereof affirmative evidence of the truth thereof against plaintiff in error, the issues in the case and law as to, on which party lay the burden of proof, needs to be considered.

Defendant in error to maintain her suit, had to prove the facts alleged in her petition, including that the aforesaid dead body was that of Hillmon, all which she did, as shown by the references to evidence hereinbefore made, including what is said in the statement part of this brief, and she established that part of her case as shown by the referred to evidence, by an abundance of testimony, independent and irrespective of the testimony of John H. Brown, but all that of itself availed her nothing, and she still stood barred and precluded from recovering the amount due her on the policy sued on, unless she could and did defeat the release pleaded by plaintiff in error, by proving either that it was without consideration (see the hereinbefore copied Secs. 6, 7 and 8, of Kansas Statutes), or that it had been so fraudulently obtained as to therefore cause it to be void, both of which causes for defeating the said release she pleaded in her aforesaid reply (r. 20–22). *To prove either was sufficient*, and because of the evidence already in the case, including that of Reuben Brown, John H. Brown, James W. Green and defendant in error, herein elsewhere referred to, showing how and why said statement and release were respectively procured, and said written statement and the fact of its existence was used to procure and in procuring the release, all as alleged in said reply, as cause for defeating the release, it surely was competent and proper to read that written statement in evidence at the time it was read, in and as part of the cross-examination of William J. Buchan, a witness called by plaintiff in

error (r. 1227), after he had testified as shown at r. 1227 to 1284, to show by competent evidence (itself a writing) to the Court and jury what kind and sort of a writing it was, that Buchan had in his own language, as he himself testified, as shown at r. 1236–7, 1261, 1269, 1270, 1284, written and obtained from Brown as shown by his referred to testimony, and to induce him to obtain which, Buchan, whilst attorney of and acting as such for Brown (r. 1250), had accepted employment from plaintiff in error and the other interested insurance companies through Munn (r. 1254) and others, its and their agents and representatives, as shown at r. 1262, 1268, 1254 to 1268, and for procuring which the plaintiff in error and the other insurance companies paid him, as shown at r. 1247–8, 1250–1, 1288, 1262, and that it was such a statement in writing, as alleged in her said reply, without making the same evidence against defendant in error, that the same or anything therein stated was true.

And further, the fact of that written statement having been so written by Buchan, attorney for Brown, because plaintiff in error and others employed and paid him so to do, as shown by his own testimony, also tending to show that Buchan ought not to be trusted or relied on by the jury as to any matter wherein he differs from any other witness, and went to the question of his credibility as a witness.

The release constituted a bar to the action, no matter by how much proof defendant in error sustained the allegations in her petition, unless she could defeat such release.

Surely she had a right to defeat that release, either by proof of want of consideration therefor or that it was fraudulently obtained, etc. If she proved either, that would defeat the release, but proving either did not bar or preclude her from proving the other cause pleaded in her reply for defeating the release; the testimony in relation to said written statement helped to prove both want of consideration and the alleged fraud; it was an item of evidence in the whole chain which showed both the fraud and want of consideration, and it is clear that she had a legal right to prove both, or either, of the pleaded causes for defeating the release.

But she could not prove what kind or sort of a document, statement in writing, Buchan had, as employee of plaintiff in error, procured from Brown, or so much of either cause of reply for defeating the release as related to the matter of that written statement, and the fact of its existence, without proof that there was such a document as it was, she could not prove what it was; that is, that it was such a statement in writing as in said reply alleged, without its being in some way read to the Court and jury, it would not have been competent for her to prove its contents by oral testimony, and if she had, so doing would have had the same effect, so far as the questions raised by said 105th assignment of error is concerned, as is now thereby raised; and by making and urging the assignment No. 105, plaintiff in error, in effect and as to consequences, claims, and asks this Court to hold, that defendant in error could not prove that part of said reply which related to said written statement *without thereby admitting* such written statement to be true, at least, without making it competent evidence against herself that all the statements therein—including enough to defeat her in the case—were true, and that she must elect either to fail to prove all of the facts alleged in her said 3d cause of reply, and thus in effect abandon that cause of reply, or introduce evidence tending to prove that said 3d cause of reply *was false* and that Hillmon was not dead, surely it ought not to be held, and is not law; that plaintiff in error got any such cinch as that against defendant in error by procuring that written statement and the release in the manner the evidence proves, at least tends to prove it did.

And surely she might, and ought to be permitted to, prove all and any of the allegations in that reply without making such false written statement evidence against her that the statements therein made were true—and without making it evidence against her to the extent or according to the purport of that refused instruction No. 44. As to that written statement, she was under the issues in the case in substance and effect in the same position as litigants are in other cases when they seek to show how a wrong had been perpetrated on them by showing they had been libeled, or

that some deed or other instrument which had affected them injuriously had been fraudulently obtained, or made for the purpose of assisting to perpetrate a fraud on them, or showing that a certain deed or other instrument was a forgery. Of course in all such cases it is necessary to read the libelous article, and fraudulently obtained false or forged instrument, in evidence to help show how the fraud and wrong was perpetrated, and what the same was; and therefore, even if that statement had not been read during, and as part of the cross-examination of William J. Buchan, a witness called by the plaintiff in error, but at any other time it would not have been evidence against her that the facts therein stated were true. In this case plaintiff in error by that refused instruction No. 44 sought to make the very fraud that it by its representatives had perpetrated on defendant in error, and which it had ratified by paying for and using fruits arising therefrom, evidence against defendant in error *because* she proved *their fraud* and the *means* by which, as alleged in said third cause of reply, they obtained the release fraudulently and without consideration.

And we contend that any claim or argument that may be made that defendant in error represented said written statement to be credible testimony is the merest sophistry, and without any manner of foundation or reason to support it; defendant in error by reading the deposition of John H. Brown represented him to be a credible witness, but she did not thereby affirm that every statement he had ever made was true. Among other things, by that deposition it was proven, so far as by testimony of Brown it could be proven, that said written statement was utterly and entirely false, and was obtained from him for the purposes in her aforesaid reply alleged, and so far as any representation of hers went in relation to the matter of credibility of anything by Brown said or done, was to the effect that he was a credible witness to testify as he did in his said deposition, the exact contrary of what is, by sophistry, claimed in behalf of plaintiff in error. Further, by her reply, notice was given and allegation made to the effect that she claimed the written statement was false.

WRITTEN STATEMENT NOT EVIDENCE AGAINST DEFENDANT IN ERROR, EITHER OF A CONSPIRACY, OR OF ANYTHING THEREIN STATED.

If the aforesaid dead body was that of Hillmon, then it follows that all of the allegations about conspiracy in the aforesaid second defense were false, and that there was not any such conspiracy as claimed in the second defense.

And further, as plaintiff in error requested that the case be decided and that the jury be directed to find their verdict on the basis that the real question in the case was as to whether the aforesaid dead body, brought from Barbour County to Lawrence in April, 1879, was the dead body of Hillmon or not, and the Court at such request so instructed, in accordance with the issues on that subject.

And the jury found to the effect that said dead body was that of Hillmon.

It follows that plaintiff in error is not in position to claim that anything said by Brown on the 4th of September, 1879, long after said dead body was on the 6th of April, 1879, finally buried in the Lawrence cemetery (r. 1542), was as against defendant in error, or any person other than Brown, evidence of any conspiracy, or of anything whatever, and that statement itself only purports to be a *narrative* of *past transactions*, which, in addition to the fact that it was made long after *all* the transactions about the dead body were closed and ended, would be and is an additional reason why it was not, and would not have been, evidence against defendant in error, no matter why read to the jury, or what construction should be put on the second defense as pleaded, or what imaginary allegations plaintiff in error would like to have this Court consider as being therein; and that we are correct in this *merely* because of the *time when* that written statement *was made*, which shows it was merely *narrative*, irrespective of *any other reason* why it was not evidence against defendant in error, see the following authorities—

Logan vs. U. S., 144 U. S. 309. (See the words "*and in furtherance of its objects*," on *id.* 309.)

The State vs. Johnson, 40 Kansas, 268, and the cases there cited.

C. M. L. I. Co. vs. Hillmon, 107 Fed. 839, and cases there cited.

People vs. Collum, 54 Pac. 589, 590, and cases there referred to.

State vs. Hinkle, 54 Pac. 155, 156, and cases there cited.

Sparf and Hansen vs. U. S., 156 U. S. 56 to 58.

And further, that statement as against defendant in error was *mere* hearsay, and was *only* competent to *show* what *sort* of a *club* plaintiff in error used it for, to help wrong her with, the same and with like effect as though it had been a *bar of iron* USED to help get the release (r. 19) pleaded from her.

LEGAL MAXIMS AGAINST SAID INSTRUCTION No. 44.

From all which it is certain among other things that plaintiff in error by asking that refused instruction No. 44 asked the Court to violate an ancient and well established legal maxim, to the effect that "A matter, the validity of which is at issue in legal proceedings, cannot be set up as a bar thereto," found in Broom's legal maxims, in the 6th Am. ed. of the 4th London, at page 128, etc.

And if the Court had given that instruction plaintiff in error would have had advantage from its own wrongs done and committed through agents whose wrongful acts it adopted and ratified and made its own by what if herein shown including payment to Buchan for getting the same, and it is a time-honored maxim that " No man should take advantage of his own wrong," as shown in the last mentioned book at page 212, etc., (and of course a corporation is in same position).

And, as defendant in error was greatly wronged by the procuration of that written statement, if the deposition of

John H. Brown was true, then if that refused instruction had been given, not only would the last mentioned maxim have been violated, but she would have been left without a *remedy* for the wrongs inflicted on her by its procuration in the manner it was by that deposition *prima facia* shown to be contrary to another maxim to the effect that "There is no wrong without a remedy," *id.* 147.

And another maxim to the effect "That a transaction between two parties ought not to operate to the disadvantage of a third," *id.* 704, would have been violated if that refused instruction had been given.

And as to the matter of any of our claims herein made in relation to the said written statement, it is not material or pertinent to refer to any testimony of Buchan to claim that he testified to the effect that Brown voluntarily made the same "because he just wanted to," for the reason that such testimony cannot be used as an estoppel, against inquiring into the truth, the testimony of each was before the jury for whatever it was worth, so far as the jury would in their province consider the testimony, &c., credible, &c.

MEANING AND PARTIAL INTERPRETATION OF, AND SOME OF THE ERRORS IN, THAT REFUSED INSTRUCTION No. 44.

The Court incorporated in its charge and gave to the jury so much of said instruction No. 44 as was to the effect that the written statement therein mentioned might be considered as affecting the credibility of John H. Brown as a witness, as shown at r. 1923.

We contend that the Court would have greatly very erroneously, to the injury of defendant in error, have misstated the law and facts and evidence, and the conclusions proper to be drawn from the evidence applicable to the matter of that instruction No. 44, and also have both usurped and invaded the province of the jury, and have itself taken from the consideration of the jury much of the evidence in the

case, if it had given any more of that instruction than it so gave to the jury.

The written statement in that instruction mentioned is set forth at r. 1284–6, and the deposition of John H. Brown in that instruction mentioned is set forth at r. 339 to 520, taken under the notice set forth at r. 341, and the agreement shown at r. 318, and an examination and comparison thereof will show that they could not both be true, and that they *irreconcilably conflict* with each other, and that if either is true as to any statement therein material to the case, the other is *utterly* and *entirely false* and *untrue* as to every statement therein material to the case; and to assist the Court in making such comparison (as well as for other purposes), we herein refer to some of the material parts of that deposition, as hereinbefore shown, and also in the statement part of this brief. And now here considering such comparison to have been made, and said *deposition* and *written statement* respectively, and the *conflicts* between the same, and the different circumstances under which they were respectively made, including that the deposition was taken openly, on notice to the other party, and that the written statement was secretly procured, fully understood and appreciated, we further argue as follows:

MATTERS UNDER OATH.

And further, said written statement was not *under oath* in any legal sense; that is, in such sense as the jury would have understood the Court to mean if it had given them that refused instruction, whilst the deposition was "under oath" within the meaning of the law on such subjects—this because the deposition of John H. Brown, in that refused instruction No. 44 mentioned, was taken at Wyandotte (now Kansas City), Kansas, about January, 1882, in pursuance of a notice to the opposite party (r. 341), (in one of the cases tried, and the agreement referred to at r. 318, that the same might be read in the other case, etc.), under the sanction and solemnity of an oath duly administered (r. 342, 520), a viola-

tion of which oath on the part of Brown would have subjected him, among other things, to the pains and penalties of perjury under Section 5392, page 1045, R. S. 1878; whilst said written statement (r. 1286) was a mere *ex parte statement*, and although in form of an *ex parte* affidavit, was not in law or legal effect sworn to in any legal proceeding, or under such circumstances as to be in legal meaning or sense, or as the jury would have understood the Court to mean if it had given them that instruction, or so under oath as to render Brown liable to the pains or penalties of perjury under said Section 5392, or William J. Buchan, who, according to his own testimony, wrote the same in his own language (r. 1236, 1269, 1270, 1283–4), and went to Parkville, where it was sworn to for the purpose of having that done (r. 1270), liable to the pains and penalties of subornation of perjury, under Section 5393, page 1045, R. S. 1878, even though both he and Brown at the time knew and believed (as elsewhere shown they did) such written statement to be false, as Buchan well understood when he procured that statement in the manner herein shown, and so in substance informed Brown when and before that statement was made, as shown at r. 473, A. 1295; 457–8, A. 1224.

And therefore that statement was not *under oath* in legal effect, nor within the meaning of the words "under oath" as used in that instruction, and by the use of those words "under oath" as used in that instruction, if it had been given the jury would have been thereby misled and misinformed, and told and instructed to the effect that as matter of law as well as of fact that said statement was *under oath* with like effect as the deposition when in truth and in fact it was not, and thus the distinction between testimony not so under oath as to make a person liable to perjury if false, or one who procured the same guilty of subornation of perjury if he knew it to be false, *and testimony under oath*, within the meaning of the aforesaid Sections 5392 and 5393, would have been wiped out and ignored.

And therefore we submit that because the words "under oath" were in that refused instruction No. 44, where and in the connection in which the same are therein, the Court

properly refused to instruct the jury to the effect that said written statement "may be considered in connection with the deposition of John H. Brown as evidence of the facts therein stated *under oath*, against the plaintiff (defendant in error meaning), *with like effect* as the deposition of John H. Brown"; that written statement surely was not "under oath" either *with like effect* as said deposition, or in any legal sense "under oath" at all; but whether it was or was not "under oath" in any legal sense at all, is probably not necessary to consider, because it is certain it was not "under oath" in the sense as used in that refused instruction, nor in the sense which the jury would have understood those quoted words if the Court had given that instruction; surely there cannot be any reasonable doubt but that if given them, the jury would have considered themselves as being told by the Court that said *ex parte pretended* affidavit *was* and *had been sworn to* in such proceeding and under *such circumstances* as to have made Brown guilty of perjury, and Buchan guilty of subornation of perjury if they knew or believed it was false when it was made, and the evidence herein referred to shows Brown knew it was false, and that Buchan then believed it was false, whereas the *pretended oath* attached to that statement, as shown at r. 1286, was simply in all and any legal sense *void*, at least, it was not of *like effect* as the oath under which Brown gave the testimony set forth in his said deposition, and if that instruction had been given, the jury would to that extent have been not only misled, but greatly misinformed as to both law and fact, to the injury of defendant in error.

LIKE EFFECT.

And further, *it was not possible* for the jury to consider said written statement *with like effect* as that deposition. If the jury gave effect to, that is, believed that deposition of John H. Brown, they would necessarily have to discard said written statement as being utterly and entirely false and untrue, whilst if they believed that written statement to be true as to any material part thereof, they must discard as

false and untrue nearly every material part of said deposition bearing upon any question in controversy, and they could not either believe that deposition to be untrue, or that written statement to be true, without also believing that all other testimony in the case which tended to show that the aforesaid dead body was the corpse of John W. Hillmon was also untrue, and thus we see plaintiff in error sought, among other things, to induce the Court to usurp and invade the province of and mislead the jury in many respects, in a very ingenuous manner.

And this conclusion was reached by the Court of Appeals, as appears from the opinion of Judge Thayer, wherein he says:

"There was evidence in the case which tendered to show that the *ex-parte* statement had been obtained from Brown on September 4, 1879, by much pursuasion and by covert threats; and by some unprofessional conduct on the part of the attorney who had obtained it; and that it had been used to induce the plaintiff to release her cause of action on the policies in suit without consideration; on the other hand, Brown's deposition had been taken at a later date in the usual way, and he had been cross-examined by the defendant company at great length. In his deposition he admitted having made the statement, and asserted that the statement therein contained, to the effect that Hillmon was not dead and that another man had been killed, were each false. He also explained the reasons and the influences which had been brought to bear upon him to induce him to make the false statement. It was the province of the jury to decide in view of the circumstances tending to show how the *ex-parte* statement had been obtained and the use that had been made of the same, and in view of the fact that it had been introduced into the case by the plaintiff, not as creditable testimony, but merely for the purpose of discrediting it, whether they would treat it with '*like effect*,' or consider it as entitled to the same credence as Brown's deposition."

Clearly if that instruction had been given, the trial court would have thereby erroneously invaded the province of the jury as to the effect to be given to said deposition and the written statement respectively.

The *chief* and *turning* point of *each* was as to whether said dead body was that of Hillmon or not—the jury had before them for consideration all of the evidence of a large number of witnesses on the question as to whether said dead body was the corpse of Hillmon or not. Defendant in error claimed it was the corpse of Hillmon; plaintiff in error claimed that it was not the corpse of Hillmon, but on the contrary that it was the corpse of one F. A. Walters; near the commencement of this brief we in the stating part thereof have referred to evidence showing that the dead body was that of Hillmon, also that it was not the corpse of F. A. Walters. If that refused instruction No. 44 had been given not only would the province of the jury have been thereby invaded in many respects, but the jury would have been thereby misled in many respects.

ASSIGNMENT OF ERROR No. 33. (R. 1948–9).

Relating to Excluded Testimony.

We submit the reason given by the Court on page 594 is sufficient answer thereto, and further there was not any foundation shown for such evidence as impeaching testimony.

But further, as Brown, as shown at pages 453 and 393 and 542, 304 and 454, testified at instance of plaintiff in error to the fact of a third party being with them at the Cowskin on the second journey, and as there was no contradictory evidence thereof, even if the ruling might or should have been different, it was immaterial whether the question was answered or not, and the evidence offered was mere hearsay, and therefore not competent.

ASSIGNMENT OF ERROR No. 34 and 35. (R. 1949.)

Relating to Excluded Testimony.

There was no foundation shown for making such proof as therein mentioned. If it was desired to try to impeach Brown, proper questions should have been asked him, and then before an offer of such proof could properly be considered, it should have been stated it was contradictory—the evidence offered was mere heresay and therefore incompetent.

ASSIGNMENT OF ERROR No. 36. (R. 1949.)

Matter of Refusal to Strike Out Certain Testimony.

The evidence referred, as shown at page 575, was received without objection, and for that reason should not have afterwards been struck out, the plaintiff in error took its chances as to what the answer of Mr. Green, one of its own attorneys might be, having done so; that we submit ended the matter, and further, Brown had sworn on the subject of identity at inquests before the time when Buchan procured from him, as above shown, the letter inquiring as to the whereabouts of John, or the aforesaid false statement of 4th of September, 1879, and we submit it was proper matter to inquire into; with reference to the matter of the releases pleaded, it threw light on why such letter and statement were wanted by the insurance companies, and was also proper matter to consider in relation to why Brown and Buchan, respectively, talked to each other and to defendant in error as they did, as shown by references to pages of record heretofore cited.

ASSIGNMENT OF ERROR No. 37. (R. 1949.)

Matter of Exception to Testimony.

We submit the question objected to was properly allowed within the rule of law relating to what person says or does, shown in the case of said plaintiff in error against said defendant in error, in 145 U. S. 285, etc., and was for many

other reasons a proper question, including the matter of showing by Davis in connection with other testimony, that Brown and Hillmon were in Medicine Lodge together twice, once in winter of 1878–9, again in March, 1879, pages 611, 612, 613, and the citations to the record heretofore made in relation to the whereabouts of Brown and Hillmon, for the purposes of identification of the corpse and to assist in determining whose dead body it was.

ASSIGNMENT OF ERROR No. 38. (R. 1949.)

Matter of Objection to Identifying Testimony.

We submit it was proper to prove that the man alluded to was with Hillmon in Medicine Lodge in the winter before the dead body, referred to on pages 611 to 613, was brought there in March 1879.

ASSIGNMENTS OF ERROR Nos. 39 and 40.

(R. 1949, 1950).

Matter of Objection to Certain Identifying Testimony.

The testimony at pages 661 to 663 of Eli Smith was competent, and with other evidence herein referred to proved John W. Hillmon and Brown were at different times in winter of 1878 and March 1879 together in Medicine Lodge. What Hillmon called himself is surely as competent as what Walters called him in the letters referred to in 145 U. S. 285, and we claim was competent for other reasons.

ASSIGNMENT OF ERROR No. 41. (R. 1950.)

Matter of Objection to Certain Identifying Testimony.

What the two called themselves comes within said case of 145 U. S. 285, if a letter from a stranger can be read referring to one as Hillmon—surely what two men called themselves is competent, but further by the chain of evidence in the case and above cited, the two men, John W. Hillmon and John H. Brown, are shown to have been together alive

twice in Medicine Lodge, and afterwards one alive and the other dead. The testimony of Derrick Updegraff, at pages 663 to 670, shows he knew the two men, had seen them at different times, and with other evidence cited herein shows the dead body was that of John W. Hillmon.

ASSIGNMENT OF ERROR No. 42. (R. 1950).

Matter of Objection to Identifying Testimony.

The answer clearly referred to the companion of Brown on their two former visits to Medicine Lodge, and surely it was competent to prove it was the dead body of Hillmon, and that dead body is above traced to the cemetery of Medicine Lodge and to Lawrence, Kansas, and at each place identified as the dead body of John W. Hillmon. (See evidence above cited in relation to identification thereof.)

ASSIGNMENT OF ERROR No. 43. (R. 1950.)

Matter of Objection to Certain Identifying Testimony.

The answer to the question objected to, showed the intention of the men competent within the law stated on the last four lines on page 299, and top line of page 300 of 145 U. S., by the Supreme Court, in the matter of this litigation, and was therefore competent.

ASSIGNMENT OF ERROR No. 44. (R. 1951.)

Matter of Identifying Testimony.

The testimony of Standiford is at pages 674 to 682 and shows he knew Hillmon, and identified the corpse as his; and the evidence cited shows that it was the dead body of Hillmon that he referred to. Surely the objected-to evidence was competent.

ASSIGNMENTS OF ERROR Nos. 45 and 46. (R. 1951.)

Matter of Objection to Certain Identifying Testimony.

See limitation put on the answer by the Court at page 676, and considering the testimony of Standiford at pages 674 to 682 and other evidence cited in this brief showing the dead body to have been that of John W. Hillmon, and that he traveled through Medicine Lodge twice when alive with Brown, we submit the evidence was competent.

ASSIGNMENT OF ERROR No. 47. (R. 1951.)

Matter of Intention.

Referring to the above relating to the 43rd, 44th, 45th and 46th assignments of error, we claim it was competent to prove the intentions of Hillmon, as expressed at pages 677 and 678; and the question was competent, as shown by 145 U. S. 285.

ASSIGNMENT OF ERROR No. 48. (R. 1951.)

Matter of Certain Excluded Testimony.

We submit it was entirely immaterial whether there was such excitement as asked about or not.

ASSIGNMENT OF ERROR No. 49. (R. 1951–2.)

Relating to Objection to Certain Testimony.

The evidence at r. 749, 750 shows that the letter referred to had been destroyed when a certain house burned, and we submit that the reason of the trial court, shown at r. 750–1, was sufficient to permit the evidence; if, however, we are wrong in that, still admitting it could not have done any harm to plaintiff in error, surely it did not and could not affect the case when it came time to instruct the jury.

ASSIGNMENT OF ERROR No. 50. (R. 1952.)

Relating to Certain Evidence

The Selig referred to in the objected-to question was at the trial a witness in the case called by the insurance companies, and his testimony is set forth at r. 1496 to 1526, and shows that he was agent for plaintiff in error in the whole matter of its insuring the life of Hillmon; and took the application and forwarded to plaintiff in error the application and M. D. certificate of Dr. J. H. Stuart, set forth at r. 180 to 185, on which the policy sued on was issued, and the evidence in the case showed that as such agent he delivered that policy to defendant in error, and although defendant in error offered to surrender, or rather to not accept it and take back the premium paid, he declined although he knew, as shown at r. 180 and elsewhere, that policy was for the last $5,000 on the life of Hillmon; all as shown by his aforesaid testimony and other evidence at r. 151–2–3–4–5 and 751–2; and we submit the objected-to question was competent for many reasons; but if we are wrong in that it could not harm plaintiff in error; and further, plaintiff in error did not object to the question asked, took its chances as to what the answer would be, and should, of course, abide thereby.

ASSIGNMENT OF ERROR No. 51. (R. 1952.)

We submit the objected-to evidence was proper and competent.

ASSIGNMENT OF ERROR No. 52. (R. 1952, 772.)

Relating to Certain Evidence.

The objected-to question was with reference to and explanatory of the circumstances under which Mr. Buchan obtained from defendant in error the before mentioned releases (see r. 772–3, etc.), and we submit it called for appropriate evidence; if not it was harmless.

ASSIGNMENT OF ERROR No. 53. (R. 1952–3, 761.)

Relating to Question to a Witness.

As we understand the record (r. 761), the trial court sustained the objection of the plaintiff in error to the question referred to in that assignment of error, surely the only exception in relation to the matter thereof was that of defendant in error (see r. 761), and further, we submit the evidence called for was competent as it related to the matter of the tintype of both Brown and Hillmon, referred to in our statement part of this brief, the loss of which, so that she could not produce the same in the trial court, was occasioned because of the investigation had at the Lawrence inquest, really for benefit of the insurance companies, but that is not here now material further than as it shows a disposition on the part of plaintiff in error to first cause loss of evidence to defendant in error, and then prevent her from giving secondary evidence of what it was the occasion of the loss of, but because of want of such exception on the part of plaintiff in error that matter is not now here important to further consider in this connection.

ASSIGNMENT OF ERROR No. 54. (R. 1953, 757.)

Relating to Certain Evidence.

The question in that assignment of error referred to was asked in reference to the matter of the bringing of the dead body of Hillmon from Barber County to Lawrence, and the disposition made of it there at Lawrence; to understand the matter it will be necessary to read the evidence of defendant in error at r. 757 to 759, as plaintiff in error did not object to the question, it could not complain of the answer; and further, surely the question and answer was competent.

ASSIGNMENTS OF ERROR Nos. 55, 56 and 57. (R. 1953–54.)

Relating to Some Excluded Testimony.

We submit the trial court properly excluded the evidence because of its being mere hearsay.

ASSIGNMENT OF ERROR No. 58. (R. 1955.)

Whilst we do not find such questions in the evidence of the witness referred to, yet if such question was asked her, it would have been appropriate and competent considering her testimony in the case, but in any event no harm was done any one by any question asked that witness.

(We have hereinbefore argued the matter of the 59th assignment of error in connection with the 31st, 105th, etc.)

ASSIGNMENT OF ERROR No 60. (R. 1958 to 1965.)

Relating to Judge's Remarks About Tampering with Jurors.

Somebody asked a juror to come to a certain place, "that there was something in it for him." (R. 802.) The juror deemed, as the Court did when the remark was related to him, that this was the inception of an attempt to bribe. There was then open to the Court two courses, to either permit the attempt to be carried further, or to make proclamation of the fact to the end that no further attempt should be made. The Court regarded the latter as the more dignified course, and announced from the bench the fact that improper remarks had been made by somebody to a juror, and that if it was persisted in the grand jury would be invoked. This ended the matter. Counsel for plaintiff in error complained of this utterance of the Court, saying in effect, that the insurance companies were the only persons who were in a position to do any bribing (r. 803), that that fact was known to the jury (r. 803), (and by way of argument we ask how known), and that hence the companies must be prejudiced.

That proposition was disposed of by the Court in the following apt language:

"Suppose that the juror who communicated this information to the Court had not done so until a verdict had been rendered in this case; nevertheless he possessed the information at all times after the invitation had been presented to him. Would the fact that the juror had been approached be sufficient to authorize the granting of a new trial, upon the claim made by counsel that he must have received certain impressions from the personnel of the parties to the case? I think not, so in principle there is no difference between a knowledge of the situation on the part of *one* juror and a knowledge on the part of the *entire* jury, and I cannot agree with counsel that this incident prejudices one side or the other." (R. 806.)

And that it was proper for the Court to say what it did in relation to the matter complained of, is shown by the case of State vs. Kyne, 62 Pac. 728.

And further, counsel for plaintiff in error alone addressed the Court on that occasion, and it is of course not for them now to complain of their own doings in that respect. There was nothing there disclosed that would give cause for the discharge of the jury or a reversal of the judgment. We would be pleased if the Court would take occasion to read all the record discloses of that incident at pages 800 to 807, which presents the best vindication of the trial court from the charge of impropriety of conduct or erroneous conclusions.

ASSIGNMENTS OF ERROR—Nos. 61, 62, and 63 (r. 1965-6-7), relating to certain excluded evidence; and

ASSIGNMENTS OF ERROR—Nos. 103 and 104 (r. 2005), relating to the refusal to give certain instructions Nos. 41 and 42, all in relation to the so-called McKamy matter.

We contend that plaintiff in error has not any available exception to the refusal of the Court to give either of those refused instructions Nos. 41 and 42, and there was not any

exception of any kind taken to the charge of the Court on the matter to which the instructions related.

Whilst the evidence, in relation to the sale of a train in Colorado, shows the train there sold was sold in 1877, and that it was owned individually by Hillmon, the evidence in relation to the mortgaged train was that it was sold to Hillmon and Brown by McKamy and Anderson in January, 1878, and the evidence shows that Hillmon had trains during different years, that is, that he had different trains; and the fact of his selling a train in 1877, in Colorado, according to the testimony of Brown is not any evidence whatever that he sold the train Hillmon and Brown purchased of McKamy and Anderson in January 1878, in Colorado; and the business that Hillmon was engaged in during 1876–7–8, freighting some, hunting and gathering buffalo hides, etc., and transporting same, required trains, and plaintiff in error to make excuse for its claim that Hillmon sold the mortgaged train, can only be supported by making Brown contrary to his testimony swear that the mortgaged train owned by himself and Hillmon was sold in Colorado, whereas the only testimony that Brown gave of any sale in Colorado was that of a train owned individually by Hillmon in 1877, and to do this plaintiff in error wants the Court to hold that when Brown said in his deposition "*1877*" he said "*1878*" we submit that that is asking and would be too much; no one asked Brown except the representatives of the insurance companies, plaintiff in error and others, anything about "trains;" they asked what questions they chose; Brown answered and they were apparently satisfied with his answers; the whole matter was between them and Brown so far as Brown's testimony is concerned, and we submit that plaintiff in error should not be accommodated so much at the expense of the character of Brown and Hillmon as to permit plaintiff in error to change "1877" to "1878," and then because of so making such change raise a presumption of a crime, but we will argue the matter on the theory of plaintiff in error, as well as show that there is no foundation or excuse for the theory or claim that there is any competent evidence that the train purchased of McKamy and Anderson in 1878 was sold in Kansas, or that it was sold at

all. At r. 379 Brown reiterates to the effect that the train sold in Colorado *was not* sold in 1878, and for all of anything shown in the evidence *either* the partner of McKamy may have taken it back, or it been left in Texas, until long after the death of Hillmon. We know nothing relating thereto further than as shown by answers to questions plaintiff in error asked Brown, and we see it did not choose to ask him about the train sold him and Hillmon.

Of course the hearsay evidence of McKamy *offered* cannot count or be of any force on this question, as that was, because of being hearsay, conclusions, etc., properly excluded; it is reasonable to suppose his informants, if he had any, were not either talking or knew accurately as to either *trains* or *years*, but as all that was mere hearsay, that suggestion is immaterial.

The assignments of error 61 and 62 are because of refusal to admit certain hearsay evidence and conclusions arrived at by McKamy (without cross-examination). We submit that the answers of McKamy in his deposition, reading of which was refused, were inadmissible because hearsay, and were conclusions of his from what he heard; and, therefore, that the Court properly refused to permit the answers of McKamy to be read; and each answer of witness was offered as a whole, and no offer was made to separate, or to offer separately, any part of either of said answers.

That the proper time to decide the objections to the incompetent and irrelevant part of the deposition of McKamy was when done at the trial. See—

Johnson vs. Mathews, 5 Kansas, 118, 124.
Tays vs. Carr, 37 Kansas, 142–4.

See also—

State vs. Lawrence, 41 Atlantic, 1027–8. (2d Syl. 1027.)

And see also the rules of law in relation to conclusions of witnesses and hearsay not being competent testimony.

Again, the special instructions numbered 41 and 42, are peculiarly obnoxious to the rule that the Court should not single out and emphasize a single subject or item of evidence.

The Court, in its general charge, did not overlook the evidence introduced by plaintiff in error, and upon which it sought to base these instructions, but the Court gave as parts of the general charge (r. 1920) a fair and accurate instruction to the jury, covering the whole subject, in the following language: "If it appears that a motive might exist for absence, and a continuance thereof, and to keep his whereabouts concealed, such motive is to be given due consideration in determining what weight is to be given to the continued absence as evidence tending to show death."

It is claimed by counsel for plaintiff in error that the Court arbitrarily excluded from knowledge of the jury the very evidence that would have furnished such adequate explanation of Hillmon's absence. A mere glance at the portions of the offered evidence so excluded will disclose that said testimony consisted of a mixture of *hearsay* and of the *conclusions* of the witness, and for that reason, among others, was not admissible as evidence for any purpose whatever, and in fact would not be legal evidence under any conceivable circumstances. If the matters which, apparently, the plaintiff in error desired to prove *existed* as facts, it was within the power of the plaintiff in error to have called the witnesses who had knowledge of such facts, and failing so to do, it certainly cannot be claimed that mere hearsay statements of third parties, and the conclusions drawn therefrom by the witness could be properly admitted in evidence over the objection of defendant in error.

In relation to the Texas statute that the plaintiff in error sought to introduce in evidence, it is sufficient to say that the Court took judicial notice of the same, and that therefore no proof thereof was necessary.

Noonan vs. Delaware, L. & W. R. Co., 68 Fed. 1.

If the plaintiff in error wanted to prove a violation of that statute it should have done so by witnesses who knew the facts that constituted such violation, and should not have attempted to prove it by mere hearsay, nor by statements which purported to be nothing more than *narratives* of what *other* persons had *told* the witness, with the *conclusions* of the

witness based upon such *hearsay*. All competent testimony that was offered in relation to the McKamy matter the Court permitted to be introduced in evidence, and we submit that there was not sufficient thereof to even *prima facie* show that any crime had been committed, and that therefore the Court might properly refuse those instructions.

And further, the evidence shows Hillmon had different trains at different times; and that in different years before 1878 he had trains; the buffalo hide business he was sometimes engaged in, in 1876 and 1877, required the use of trains. And further, there was not sufficient evidence furnished to maintain the claim of plaintiff in error that anything about the McKamy matter tended to explain Hillmon's absence. But the Court, in order to give the plaintiff in error the benefit of all of the evidence that was admitted in its general charge, as hereinbefore pointed out, submitted the whole matter to the jury.

By their special instructions, Nos. 41 and 42, counsel for plaintiff in error required the Court to submit to the jury the question as to whether John W. Hillmon had not been guilty of a felony in the State of Texas, for the collateral purpose of showing that he may have had a motive for disappearing and keeping himself concealed. We submit that before the Court could be required or would be justified in submitting such a collateral issue to the jury, there must have been preliminary proof sufficient in the judgment of the Court to make out at least a *prima facie* case of such guilt, and that the party alleging such crime should be held to a reasonable degree of strictness in making such a *prima facie* proof. The presumption of innocence in such case, no more than any other, should be lightly brushed aside. All of the essential ingredients of the crime charged should be first made out or supported by definite, sufficient and legal evidence. An analysis of the Texas statute and the application thereto of all that the evidence proves, or tends to prove, will show that such evidence falls far short of making a *prima facie* case. It seems that Hillmon and Brown bought an ox train of McKamy and Anderson, in Texas, in January, 1878 (r. 1890, 1896–7–8), and then gave a mortgage thereon and on other

property to secure the indebtedness. This indebtedness was in the aggregate only $3,623.90. It is without evidence claimed by plaintiff in error that Hillmon left Texas, taking the train, or a portion thereof, with him, but concede the other mortgaged property was left, and there is no evidence that it was not amply sufficient to pay the debt, nor indeed any evidence as to its value except evidence that it was with other considerations given in payment of the mortgage debt. (R. 374–375.) And the burden of proving that it was insufficient in value to pay the debt was on the plaintiff in error. Now, an ingredient of the Texas statute is that the removal or sale of the mortgaged property must have been with "intent to defraud" the mortgagee. If after the removal of a part of the mortgaged property, that which was left in Texas was amply sufficient to pay the mortgage debt, then the removal of that part could not in fact operate to defraud the mortgagee, and the felony defined by the Texas statute could not be predicated of such removal. As in cases of the alleged obtaining of money by false pretenses, where the person obtaining the money gave both personal and mortgage security, and it transpired that the mortgagor did not own the mortgaged property, as he had falsely represented he did, yet the personal security being ample, so that no loss could in any event occur to the lender of the money and holder of the mortgage, it was held that there could be no conviction, as the intent to defraud was not made out; in other words, the intent to defraud could not be predicated on an act that could not in any event operate to defraud in fact.

State vs. Clark, 46 Kansas, 65.

The evidence instead of making a *prima facie* case of intent to defraud on the part of Hillmon shows that all of his transactions were open and public, and marked by no concealment, and were not acts showing consciousness of any wrong doing; and in view of his long absence and the almost conclusive evidence of his death, the Court was justified before submitting the question of whether Hillmon was guilty of a felony, in requiring something more substantial in proof of his wrong doing than could be gathered from the weak

and unsatisfactory testimony of McKamy, whose deposition was taken without cross-examination, and who made no allusion to and did not explain what disposition he had made of the remainder of the mortgaged property.

A review of that part of the testimony of McKamy which was admitted, and upon which counsel for plaintiff in error principally bases their special instructions, Nos. 41 and 42, will show how unsatisfactory was the foundation laid. McKamy, after detailing the transaction of the sale of the ox-train to Hillmon, admits that the security included 2,500 buffalo pelts. He does not claim that the pelts were not in existence, does not state what was their value, or say what disposition of them was made. Common knowledge possessed by every man teaches that the cost of killing, skinning and delivering these hides to depots or places of storage must have been such that when stored they would have been worth from $3.00 to $5.00 each, and in the aggregate amounted to at least $7,500. Possibly McKamy disposed of those 2,500 pelts and wrongfully applied the proceeds upon the unsecured indebtedness mentioned in his deposition. He in effect says it was agreed that the money was to be paid from the proceeds of the buffalo pelts, and the proceeds of their hunting and freighting. (R. 1392.) While he says he was never paid a *cent* of the indebtedness, he does not say whether he obtained the buffalo hides and the proceeds of their hunting and freighting, or that his partner did not receive payments, and appropriated the pelts to the payment of the indebtedness.

So far as the evidence goes it shows a sale in January, 1878, from McKamy to Brown and Hillmon of a train (r. 1389, 1390), and the notes and mortgage of the two men show they were made January 10, 1878.

The time referred to by William Hillmon, at r. 1097, is 1878.

The reference to the evidence of John H. Brown (r. 372–6), and the train that he there refers to as being sold by Hillmon *was sold in August, 1877* (r. 376). At record 375 the evidence shows that the train mentioned as sold in August,

1877, in Colorado, was not the train obtained from McKamy and Anderson in January, 1878, by Hillmon and Brown. The evidence on pages 376 and 377 also shows that the train sold in Colorado was a train that belonged to Hillmon individually, and Hillmon paid Brown for his services, as there shown. From this we see that the train that Hillmon sold in Trinidad and Pueblo, Colorado, was not shown to be the train that McKamy and Anderson sold to Brown and Hillmon, and which Brown and Hillmon mortgaged back to them in January, 1878; so that the evidence, instead of showing that the mortgaged train was sold in Colorado, fails to make any such showing; but the only evidence of the sale of a train or any part thereof in Colorado, was of same being sold in August, 1877, long before the mortgage was made; hence, it must have been another train owned by Hillmon. In such evidence, which is all the evidence plaintiff in error refers to, we submit there was not so much as an excuse for asking either of the refused instructions mentioned in specification 9 or for offering the Texas statute. From this we see that all the evidence considered together leaves plaintiff in error without any competent testimony tending to show that any of the property mortgaged in January, 1878, was removed out of Texas or sold in Colorado, and we submit that if the Court had given either of the said refused instructions it would have been a matter of manifest error against defendant in error, for want of sufficient competent evidence to sustain the same or to make it proper to direct the attention of the jury to the Texas statute.

The Court properly regarded the proof insufficient to make a *prima facie* case of Hillmon having committed a crime against the Texas statutes, and we insist that there was no such *prima facie* showing made. But conceding for the sake of argument that the trial Court should have reached a different conclusion, still that Court cannot be put in the wrong unless appropriate instructions were asked, refused and specifically excepted to, which was not done in this case.

Undisputed facts shown by the witnesses of plaintiff in error are that Hillmon and Brown were in Texas on Pease

River and that Hillmon had a train there in 1876 and 1877, and they returned to Kansas in the fall of 1877.

The train Brown speaks of as having been sold in Colorado was the one brought from Texas in 1877, and not the mortgaged train. This we insist sufficiently appears from the testimony of their witness, W. W. Nichols, who met Hillmon in Texas in 1876, and saw him on his return in 1877 (r. pp. 1153, 1155, 1159), and the testimony of Brown brought out by plaintiff in error in his cross-examination (r. pp. 362 to 381).

Brown in 1876 and 1877 was working for Hillmon, and was "paid off" when the train was sold in 1877. (R. p. 363, ques. 204; p. 377, p. 246.

Hillmon and Brown again went to Texas in 1878 and then bought the train upon which the mortgage is claimed to have been given. This train, it is claimed, and the evidence shows, was sold to Hillmon and Brown jointly and by them jointly mortgaged, while the first train was owned by Hillmon individually and Brown was working for him. That Hillmon and Brown were hunting in Texas in 1876 and returned to Kansas in the fall of 1877; that they were again hunting in Texas in 1878 and returned to Kansas in the fall of 1878; that on both occasions they had a train, the first one belonging to Hillmon individually and the second one to Hillmon & Brown jointly, and that Brown was testifying as to the sale of the Hillmon train in 1877 certainly appears from the pages of the record referred to above. That the court below so understood it is beyond question.

All of the testimony of Brown on the subject was drawn out by plaintiff in error. It was outside of any possible legitimate cross-examination and was its testimony. If the matter was left in any doubt, it was so left by plaintiff in error, and just as it chose to leave it, and is the only testimony offered by it to convict Hillmon of felony.

The court below evidently held that it was not sufficient for that purpose in that it was not made to appear thereby that the train Brown testified to having been sold was the mortgaged one, and accordingly for that and the other rea-

sons stated refused to submit the matter to the jury except in so far as it touched the question of Hillmon's financial condition or ability.

And further, the matter of the mortgaged train was collateral to the issues.

IN RELATION TO THE MATTER OF CONSPIRACY AND FRAUD.

(Referred to at pages 8 to 16 of the petition for certiorari in subdivisions 3 and 4 thereof.)

ASSIGNMENTS OF ERROR—Nos. 64, 65, 66, 67, 68, 69, 70, 71 and 72 (r. 1978 to 1984), relating to certain questions asked witnesses Phillips, Blythe, Crew and Carr; and

ASSIGNMENTS OF ERROR—Nos. 87, 88, 89, 90, 91, 92 and 106 (r. 1997 to 2000 and 2006), relating to instructions refused or given and charge given on the conspiracy question.

In considering the matter of those several assignments of error it is necessary, first, to consider and determine what were the issues made by the pleadings in the case, and the law applicable thereto, which examination will show that there was not *either* such issues in the case, OR SUCH PARTIES THERETO or evidence *offered or given* as to require the trial court to do or rule otherwise than it did, or on or because of which plaintiff in error can here, or could in the trial court, make or raise any question whatever as to whether the policy sued on, or the contract of insurance, was or was not void in its inception, AND THEREFORE WE SUBMIT THAT ALL PLAINTIFF IN ERROR SAID IN ITS SAID PETITION FOR CERTIORARI OR BRIEF IN SUPPORT THEREOF, AS WELL AS WHATEVER IT MAY SAY IN ANY BRIEF IT MAY FILE HEREIN, IN RELATION TO WHAT AN INSURANCE COMPANY MAY PLEAD OR PROVE AS A DEFENSE TO

A POLICY IS ENTIRELY IRRELEVANT IN THIS CASE, BECAUSE SUCH DEFENSE WAS NOT PLEADED BY PLAINTIFF IN ERROR IN ITS ANSWER IN THE CASE.

The laws of the State of Kansas, by Section 914, R. S. 1878, page 174, made applicable to this case so far as the same are material to any question involved herein, and relate to the pleadings in the action, as found in the General Statutes of Kansas of 1868, at pages 647 to 650 and 652 thereof, and in all subsequent compilations of the laws of Kansas, are as follows, except that Sec. 86 is set forth as amended in 1870, as shown by the Kansas Session Laws of 1870, Ch. 87, page 171, Sec. 3. And also except that in subsequent compilations, published by private parties, the capitalization, punctuation, etc., are different:

"SEC. 84. The pleadings are the written statements, by the parties, of the facts constituting their respective claims and defenses.

"SEC. 85. The rules of pleading heretofore existing in civil actions are abolished; and hereafter, the forms of pleading in civil actions in courts of record, and the rules by which their sufficiency may be determined, are those prescribed by this code.

"SEC. 86. The only pleadings allowed are: First, The petition by the plaintiff. Second, The answer or demurrer by the defendant. Third, The demurrer or reply by the plaintiff. Fourth, The demurrer by the defendant to the reply of the plaintiff.

"THE PETITION.

"SEC. 87. The petition must contain: First, The name of the court, and the county in which the action is brought, and the names of the parties, plaintiff and defendant, followed by the word 'petition.' Second, A statement of the facts constituting the cause of action, in ordinary and concise language, and without repetition. Third, A demand of the relief to which the party supposes himself entitled. If the recovery of money be demanded, the amount thereof shall be stated; and, if interest thereon be claimed, the time from which interest is to be computed shall be also stated.

"ANSWER.

"SEC. 94. The answer shall contain: First, A general or specific denial of each material allegation of the petition controverted by the defendant. Second, A statement of any new matter constituting a defense, counter-claim or set-off, or a right to relief concerning the subject of the action, in ordinary and concise language, and without repetition. Third, When relief is sought, the nature of the relief to which defendant supposes himself entitled. The defendant may set forth, in his answer, as many grounds of defense, counter-claim, set-off, and for relief, as he may have, whether they be such as have been heretofore denominated legal, or equitable, or both. Each must be separately stated and numbered, and they must refer, in an intelligible manner, to the causes of action which they are intended to answer.

"REPLY.

"SEC. 102. When the answer contains new matter, the plaintiff may reply to such new matter, denying, generally or specifically, each allegation controverted by him; and he may allege, in ordinary and concise language, and without repetition, any new matter not inconsistent with the petition, constituting a defense to such new matter in the answer; or he may demur to the same for insufficiency, stating, in his demurrer, the grounds thereof; and he may demur to one or more of such defenses set up in the answer, and reply to the residue.

"SEC. 122. In pleading the performance of conditions precedent in a contract, it shall be sufficient to state that the party duly performed all the conditions on his part; and if such allegations be controverted, the party pleading must establish, on the trial, the facts showing such performance."

1st. As to the pleadings in the case.

The petition was in ordinary form, on a policy of insurance wherein it was among other things in substance alleged, that plaintiff in error on March 4th, 1879, insured the life of John W. Hillmon, the husband of defendant in error, for the

term of his natural life, to the amount of $5,000 in her favor, and that he died an March 17th, 1879, and that both he and she duly performed all the conditions of the policy, on their or either of their part to be done or performed (r. 3 to 5).

The last answer to that petition is at r. 17 to 19.

The first defense was a general denial (r. 17).

By the 3rd defense, the supposed release hereinbefore more fully mentioned was pleaded; the only other defense pleaded was the 2nd set forth at r. 18, wherein, after making such general allegations of fraud and conspiracy, as however gratifying to the pleader or party to make, do not admit of proof in any court, as shown in by the herein cited decisions of this Court and of the Supreme Court of Kansas (where the contract was made, and all the transactions including the trial of the case in relation thereto occurred), it, plaintiff in error, as and for its allegations of what it hoped to prove such conspiracy and fraud, as it relied on, consisted of, alleged in substance and effect that said John W. Hillmon, Levi Baldwin and John H. Brown, with intent to cheat and defraud plaintiff in error, and for the purpose of securing payment of certain policies, including the one sued and recovered on as aforesaid, did in the lifetime of said Hillmon falsely and fraudulently pretend and represent unto plaintiff in error, that a certain dead body was the dead body of said Hillmon, and that said John W. Hillmon was still alive and not dead, and was keeping himself concealed under assumed names.

As said answer was filed on the 7th of June, 1881 (r. 19), more than two years after the death of Hillmon, on the 17th of March, 1879, notwithstanding the premium had been paid for a period beyond the time of the death of Hillmon, the policy would, because of such two years premium for the last of which years, that is for time after death of Hillmon had not been paid, have become lapsed and inoperative before the time when that answer was filed, if Hillmon was as therein alleged then still living, which explains what is meant in said answer about non-payment of premiums and the policy being void and inoperative.

That answer was met by such reply, as shown at r. 20 to 22, which so far as the matter of said 2nd defense is concerned consisted of a general denial, and of a statement in the 3rd cause of reply to the effect that said John W. Hillmon died in Barbour County, Kansas, on or about the 17th day of March, 1879, from a gun shot wound produced by the accidental discharge of a gun in the hands of John H. Brown.

That the words "unlawfully and fradulently, confederating, conspiring, contriving and intending to cheat and defraud this defendant (plaintiff in error meaning)" contained in said 2d ground of defense were as to this case surplusage and mere epithets, at least that the meaning, scope, force or effect of that 2d ground of defense was not by insertion or use of those words therein, extended or enlarged or to be construed as containing allegations because of, or under which proof or testimony could be introduced, beyond, further or other than merely to permit plaintiff in error, if it could, to prove that said Hillmon was alive and not dead, or that the dead body herein mentioned was not the corpse of John W. Hillmon, and that such general allegations as those about conspiracy, fraud, &c., in that 2d defense are and will be limited to the particular and only issuable allegations therein made, that is, to those therein to the effect that Hillmon was alive and not dead, that is, as applied to the evidence at the trial making a question as to whether the herein mentioned dead body was that of Hillmon or not, is shown by the decisions and opinions of this Court in the following cases, to-wit:

Kent vs. Lake Superior Canal Co., 144 U. S. 91.
Fogg vs. Blair, 139 U. S. 118, 127.
Atlantic Delaine Co. vs. James, 94 U. S. 207, 208, 214.
Knox Co. vs. Harshman, 133 U. S. 155.
Ambler vs. Chouteau, 107 U. S. 586, 591 (last 15 lines of the opinion in this last case).
U. S. vs. Atherton, 102 U. S. 372.
Quincy vs. Conlon, 104 U. S. 426.

The Supreme Court of the State of Kansas, in its opinon in the case of—

The State *ex rel.* vs. Williams, 39 Kansas 520,

as shown by its opinion in that case delivered by Johnston, J., held as follows:

"Allegations of fraud and illegality, without a statement of the facts constituting the same, are mere legal conclusions and of no force in a pleading. No issue is presented by such averments, and no proof is admissible thereunder. (L. L. & G. Rld. Co. v. Comm'rs of Douglas Co. 18 Kas. 169; Clark v. Dayton, 6 Neb. 192; Pelton v. Bemis, 44 Ohio St. 51; Ockendon v. Barnes, 43 Iowa, 615; M. & C. Rld. Co. v. Neighbors, 51 Miss. 412; Smith v. Lockwood, 13 Barb. 209; Bliss, Code Pl. SS. 213, 334; Pom. Rem., § 530.)"

And the cases of—

Paving Co. vs. Botsford, 56 Kansas, 541.
Gleason vs. Wilson, 48 Kansas, 500, 502.
K. P. & W. Rld. Co., vs. Quinn, 45 Kansas, 478,

are to the same effect.

And those Kansas cases show the rule to be that in Kansas courts there could not have been any evidence given under the said second ground of defense further than as to whether the dead body herein mentioned was that of Hillmon or not.

In Van Horn vs. Van Horn, 28 Atlantic Reporter, page 669, the Court of Appeals of New Jersey says:

"The courts almost uniformly disregard the charge of conspiracy as an actionable element, and consider the malicious injury and resulting damage as the foundation and support of the action. Lavarty vs. Varnarsdale, 65 Pa. St. 507. Pol. Torts., p. 267, says: 'It seems to be the better opinion that the conspiracy is not in any case the gist of the action, but is only matter of inducement or evidence.' Mr. Bigelow, in a note to the leading Cases on the law of Torts., (p. 214) says 'that the effect of the principal case is that the fact of

conspiracy becomes actionable only when the act would be a ground of suit if done by a single person.' The Maryland Court of Appeals, in Kimball vs. Harman, 34 Md. 407, declared that an act which, if done by one alone, constitutes no ground of an action on the case, cannot be made the ground of such action by alleging it to have been done by and through a conspiracy of several."

In Commercial Union Assur. Co., Limited, of London, et al. vs. Shoemaker, 88 N. W. Reporter, 156, the Supreme Court of Nebraska says:

"There is no doubt of the right of a plaintiff to maintain an action against two or more parties for conspiring to do and actually doing some unlawful act to his damage; but the Courts, so far as we are aware, are unanimous in holding that confederation and conspiracy are not actionable unless something in pursuance of the common plan is actually done, and the thing done results in injury to the plaintiff, and the facts constituting this injury, and the damage resulting therefrom must be alleged."

In Brackett vs. Griswold, 20 N. E. Reporter, 376, the Court of Appeals of New York says:

"The allegation that there was a conspiracy to commit the fraud does not affect the substantial ground of action. The *gravamen* is fraud and damage, and not the conspiracy. * * * But a mere conspiracy to commit a fraud is never of itself a cause of action, and an allegation of conspiracy may be wholly disregarded and a recovery had, irrespective of such allegation, in case the plaintiff is able otherwise to show the guilty participation of the defendant."

In Stevens vs. Rowe, 59 N. H. 578, the Supreme Court of New Hampshire says:

"The wrongs claimed to have been done to the plaintiff, and not the conspiring to do them, are the foundation of the action, and the damage resulting from the unlawful acts must be alleged."

And by the weight of modern authority—English and American—it is well settled that at law, as in equity, a mere allegation of fraud in general terms, without stating the facts on which the charge rests, is insufficient, is shown by the opinion of Gray, Justice, in the case of—

Hazard *et al.* vs. Griswold, 21 Fed. 179–180,

which opinion was delivered with reference to a plea in that case alleging that a certain writing obligatory "was obtained from the defendant by the plaintiff therein, and others in collusion with them, by fraud, covin and misrepresentation, and that the said writing was executed in confidence of such misrepresentations." And thus we see that was a case parallel to this, except that in the case at bar, the 2d defense adds, to the general allegations of conspiracy, fraud, etc., specific allegations to the effect as applicable to evidence introduced, that the aforesaid dead body was not the dead body of Hillmon, but was in his lifetime by himself, Brown and Baldwin procured and presented to plaintiff in error for the purpose of securing payment of the policies and obtaining the money thereon—thus limiting those general allegations substantially and in practical effect to the question whether said dead body was that of Hillmon or not.

And that last cited case, as well as the cases of—

Paving Co. vs. Botsford, 56 Kansas, 541;
Gleason vs. Wilson, 48 Kansas, 500, 502;
Kellar vs. Johnson *et al.*, 11 Indiana, 337,

wherein it was sought to defeat a recovery on contracts lawful on their face by reason of general allegations of fraud, are specially applicable to this case at bar, because the question as to the meaning, force and effect, or rather, want of force or effect, of such general allegations, arose in those cases on alleged defenses of defendants in the trial courts.

And further, that the words "unlawfully and fraudulently, confederating, conspiring, contriving and intending to cheat and defraud this defendant"—plaintiff in error meaning—as stated in said answer in said second ground of defense therein, were and are mere surplusage, and irrelevant and

immaterial to the case, and were not even privileged matter, but on the contrary, were libelous, is shown by the case of—

Union Mut. Life Ins. Co. vs. Thomas, 83 Fed. 803–4–5,

and the several cases there cited, including one in this Court on principle applicable.

And further, the following list of cases as well as those cited *ante* respectively show that general allegations of conspiracy, fraud, etc., in a pleading do not amount to anything more than mere idle wind, further or otherwise than as connected with limited and explained by and applicable to specific issuable allegations of fact which, if true, would show that the party pleading the same was actually injured, and thereby suffered and sustained actual damage because thereof, to-wit:

Adler vs. Fenton, 24 Howard, 407, 410.
Findley vs. McAlister, 113 U. S. 114.
Savile vs. Roberts, 1 Ld. Raymond, 374.
Cotterell vs. Jones, 11 C. B. 713.
Shaple vs. Page, 12 Vt. 519, 533–4.
Easton vs. Patracy, 1 Dev. and Bat. 44.
Kimball vs. Herman, 34 Md. 407.
Loverty vs. Van Arsdale, 65 Penn. St. 507.
Parke vs. Huntington, 2 Gray, 124, 127–8.
Herron vs. Hughes, 25 Cal. 556.
McHenry vs. Sneer, 56 Iowa, 649.
Page vs. Parker, 40 N. H. 47, and 43 N. H. 363.
Robinson vs. Parks, 24 Atlantic, 411; s. c., 76 Md. 118.
Maxwell L. G. Case, 121 U. S. 380, seven lines at bottom of page,

and by those seven lines, as well as by the other first herein before cited cases in relation to said second defense, this Court has decided, and it is shown (in conformity with the decisions of other courts above cited in relation to the matter of that defense) that unless there be such resulting injury, the alleged conspiracy, fraud, etc., is utterly immaterial; which as applicable to this case is equivalent to a decision, that if the aforesaid dead body was the corpse of Hillmon, that then all of

the allegations in said second defense about conspiracy, conspiring, contriving and intending to cheat and defraud plaintiff in error were immaterial, false and untrue, this because, as shown by above cited cases, the general allegations about fraud and conspiracy in that 2d defense were limited to the specific fraud charged, that is, to the presentation of a dead body other than that of Hillmon, claiming it was his dead body—and amounted to nothing further than as they were so limited, and referred to the specific fraud charged, which, in substance, was that the dead body claimed to be that of Hillmon was not his corpse.

And further, we submit that the only legitimate object or use of such general allegations of conspiracy, etc., in a pleading in a civil action or suit between private persons, as distinguished from criminal prosecutions on the part of the State, is, with the help of other allegations stating facts, showing the party, and how the party pleading had been injured and sustained damages because of the wrongful conspiracy and intent alleged, as against persons defendant in the action, who, but for such conspiracy, would not be liable for or because of the alleged facts which stated the injury received; and also, that a private party to a suit cannot be heard to complain of, or be permitted to prove, any alleged conspiracy unless by allegations first and by evidence at the trial such party proves it or he was injured by such alleged facts, and that such party cannot recover or obtain relief, remedy or damages further or other than as and to the extent it or he, by such allegations and proof, shows it was actually wronged, and sustained damages because of the alleged wrongful intent and execution thereof. And in such cases the combination or conspiracy is not the *gist* of the action, but is mere surplusage intended as a matter of aggravation, and cannot serve as a basis of *recovery* or *defense*, but is simply a *string* or *means* by which, if proven by proof of wrongful special acts alleged, to hold some one or more person party to the action liable to the injured party for the damage sustained because of wrongful acts done. (Porter vs. Mack, 40 S. E. 459, 463, and authorities there cited.) And that such general allegations of conspiracy, etc., are without

force or effect, as made in this case in a civil action on a lawful contract to defeat a recovery thereon, is, we submit, established by so many and such numerous authorities, including text-books and reports, that it is not necessary or appropriate to cite any to that point, other than such as we herein do with reference to the force and effect of the 2d plead defense, including those hereinbefore cited, and—

Porter vs. Mack, 40 S. E. 459, 463, and cases there cited; s. c. 50 W. Va., 581.

6 Am. & Eng. Ency. of Law, 873–4 (2d ed.)

4th Ency. of Pl. & Pr., 738–9, Sub. 4 and notes, and cases there cited.

For a late case on this subject, see also—

Commercial Union Assur. Co. vs. Shoemaker, 88 N. W. 156, 158, and the cases there cited.

And by examination of the aforesaid pleadings and the sections of statutes and decisions and authorities above cited, it is seen and made plain and certain that so far as matter of fraud, intent or conspiracy was or is concerned, the disputed facts were merely and only as to the question whether the herein mentioned dead body so as herein shown, brought from Barbour County to Lawrence, reaching Lawrence on the 3d of April, 1879, was the dead body of John W. Hillmon or not. And on the issues made the case was tried.

Such as alleged fraud, conspiracy, etc., could not have been practiced or consummated by John W. Hillmon and others, if the dead body herein mentioned was his corpse; and it is entirely certain that if said dead body was the corpse of Hillmon, that then and in such case the supposed acts and facts plead by plaintiff in error as the acts and facts DONE FOR THE PURPOSE OF CONSUMMATING SUCH AS ALLEGED CONSPIRACY, were and are utterly and entirely *false* and *untrue*.

And from the issues so made, as illustrated and explained by the above quoted sections of statute, and the cases and authorities cited, it is evident and certain, beyond cavil or room for dispute, that plaintiff in error did not, in or by its said answer, allege any fact or facts which, if true, would

have shown that the policy sued on was void when made, or at all, because of any intent at any time of or on the part of either John W. Hillmon or of any person or persons, as the allegations made only went to defeat a recovery on the policy, conceding it to be valid, and that the only evidence that was or would be competent on the issue made in part by that 2d plead defense, was as to whether said dead body was that of Hillmon or not, because if that dead body was the corpse of Hillmon, then that 2d defense was false, and if it was not his dead body, defendant in error could not recover, whether there was or was not any conspiracy.

And therefore it follows that notwithstanding however interesting it might be to investigate or determine as to what plaintiff in error might have plead in relation to the matter of any such supposed conspiracy, fraud or intent, yet as it *did not* plead facts, which, if true, would have rendered that policy void when made, it is not *now* relevant or material in this case to consider or determine any question raised by the aforesaid sixteen assignments of error, Nos. 64 to 72, 87 to 92 and 106, or any thereof, because there was not any issue in the case under or because of, or as to which any of the rejected testimony or refused instructions, or instructions given or mentioned in any of those several assignments of error, were admissible, competent, appropriate or applicable; and we submit the foregoing shows the rulings and action of the Court in relation to the matter of those assignments of error, was correct and not erroneous, irrespective of any other reason why its action and rulings in relation thereto were proper and in accordance with law, and therefore not erroneous.

In this connection and to show that defendant in error did not either lose or waive anything by not moving to strike out any of the words in said second defense, see—

Miller vs. Brumbaugh, 7 Kansas, 353-4.

1 Greenleaf on Ev., Sec. 51.

21 Ency. of Pl. and Pr., 257 etc., title, surplusage, subdivision (3) At Trial—General Rule—and note 2, and cases therein cited.

ALL CONSPIRACY QUESTIONS ELIMINATED FROM THE CASE BECAUSE OF WHAT PLAINTIFF IN ERROR DID AT THE TRIAL.

And further, after the evidence was all in, and it was time for parties to present to the trial court such instructions as they respectively desired to have given to the jury, plaintiff in error asked that Court to instruct the jury, as shown by its asked for instructions Nos. 1 and 28, referred to herein near the commencement of the stating part of this brief, and as shown at r. 1904, 1909, 1996, 2003, and thereby in effect requested the Court to ignore the conspiracy, fraud and intent question (as we see from the cases cited it ought to), and thereby, among other things, not necessary to consider in this connection (but as to which see what we hereinafter say in relation to assignments of error Nos. 85 and 99, respectively, where it is shown the parts of those instructions not given were not proper to be given to the jury), requested the Court to instruct the jury to the effect that the real question (meaning of course the matter in controversy in the case) was whether the aforesaid dead body so as aforesaid brought from Barbour County to Lawrence in April, 1879, was that of John W. Hillmon or not, and the Court *adopted such request* of plaintiff in error and instructed the jury *accordingly*, as shown at r. 1917–18–19, 1921; of course, *such* could not, and would not, have been the *real question* in the case as stated, in and according to the meaning of those two asked instructions, if the claimed question or legal points about conspiracy, plaintiff in error, in disregard of what it so did now urges herein, had not been by it abandoned, nor *unless* the jury ought *to find* for defendant in error if that dead body was the corpse of Hillmon, and for plaintiff in error if it was not.

And by requesting the trial court to so instruct the jury, plaintiff in error showed that it thereby conceded, and also then at the trial construed the issues made as aforesaid, and asked the trial court to consider and construe those issues to be in legal effect and substance such, and as we herein above

claim the same to be (in conformity with the rules of law shown by the hereinbefore referred to cases on that subject).

And from all this it follows that plaintiff in error at the trial admitted and asked the Court to act, rule and instruct the jury on a basis, theory and view of the facts and law applicable thereto and construction of the pleadings and issues, which shows and demonstrates that the excluded evidence referred to in the aforesaid assignments of error Nos. 64 to 72 was not appropriate, admissible or competent under or because of any issue in the case, and that plaintiff in error could not properly at the trial ask the Court to *construe* those issues *otherwise* or *differently*, or to give the jury any charge or instruction *contrary to what it so asked, and the Court* accepted and adopted; and that it should not, and could not, in that Court, and should not in any court of review, or now here, be heard to claim either that the issues tendered, raised or made by that 2d supposed ground of defense, or the reply, so far as applicable thereto, was other or different than as we herein claim, and as it (plaintiff in error) *thus* conceded the same and asked the Court to construe the same to be; or that the trial court erred in or by so charging the jury as to that question, as it so requested; or that the Court erred in or by refusing to give any charge or instruction conflicting therewith—and if we are right in that respect, then we contend it cannot be heard on its assignments of error Nos. 87 to 92 and 106, or as to whether any of the instructions therein mentioned should or should not have been given to the jury.

And further, that a party cannot complain of an action done at its request, see—

Hale vs. Wilder, 8 Kansas, 541, 545,

and the numerous authorities to the same effect, and therefore, as plaintiff in error requested the Court by said first and twenty-eighth instructions, to direct the jury to dispose of the case by determining the question as to whose the aforesaid dead body was, we submit that it should be held that plaintiff in error by so doing *consented* that the Court so do, and waived a consideration of any other question of fact; and thereby, in legal effect, withdrew its request to give any

instruction on the conspiracy question, operative as such withdrawal when the Court instructed the jury to find their verdict according as they should determine the question as to whose the dead body was.

And we submit that having so requested the trial court to so instruct the jury, plaintiff in error cannot, in this Court, be heard to say or claim that the trial court erred in so charging the jury; or that it should have given the jury any instruction which, if given, would have confused the jury on that point, or have, in any manner, conflicted with the said parts so adopted of those two instructions Nos. 1 and 28—this because a party *is bound by such theory* of the case as the Court *adopts* at *its request.*

New York, &c., Railroad Co. vs. Estill, 147 U. S. 592 (2nd Syl. on that page).

L. N. & S. Rly. Co. vs. Curtan, 51 Kansas, 432, 438.

21 Ency. of Pl. and Pr., 666, 667, 668, 669 and cases there cited.

Walton vs. Chicago, St. P., M. & O. Ry. Co., 56 Fed. 1006, 1008, and cases therein cited.

Badger vs. Johnson-Fife Hat Co., 85 Fed. 408.

Union Pac. Ry. Co. vs. Harris, 63 Fed. 801–4, and cases there cited.

Leonard vs. N. E. Mut. Life Ins. Co., 48 Atlantic, 808.

And those authorities are in line with an ancient maxim to the effect that "he is not to be heard who alleges or claims things contradictory to each other," found in Broom's legal maxims in the Sixth American Edition from the Fourth London, at page 130; and in relation to which matters contradictory we refer in this connection to the hereinafter cited case of

Losch vs. Pickett, 36 Kansas, 222,

and other cases therewith hereinafter cited which, as applicable to the question now under consideration, are to the effect that under the practice in Kansas (which, because of Section 914 R. S. of Congress, 1878, was applicable to the

proceedings in the trial court) plaintiff in error could not be heard or permitted to ask, claim or assert matters contradictory, or to have conflicting rules of law laid down to the jury for their guidance by asking the instructions it did about conspiracy; and as to what the real question in the case was, plaintiff in error asked the Court to contradict itself, but the Court refused so to do, but gave those of the instructions asked by plaintiff in error which, as we have before seen, conformed to the issues in the case, and were in accordance and practically universally recognized as shown, with the rules of law enunciated by the authorities above cited on the question in relation to conspiracy.

And further, Plaintiff in Error, by asking those Instructions Nos. 1 and 28 to be given to the jury, requested and consented that all issues and questions of fact be disregarded and eliminated from the case, except the single question as to whether the dead body was the corpse of Hillmon or not, and that the verdict be found according as the jury should determine that single question of fact.

And therefore, plaintiff in error cannot now in this Court be heard to complain of any part of the charge given by the Court to the jury, or of any refusal of the Court to give to the jury any refused instruction in relation to any other matter or question of fact in the case, no matter what other questions or issues there were in the case, or how made, or raised, or what testimony, or want of testimony, in relation thereto, there actually was, or was claimed to be, or as to the law applicable to any other question of fact in the case other than the single one, as to whether said dead body was that of Hillmon or not. As to this, in addition to the authorities above cited, see particularly—

21 Ency. of Pl. and Pr., 667–8, Sub. 5 and notes.

Arkansas City Canning Co. *et al.* vs. Dunston, 64 Pacific, 1025–6 (a Kansas Supreme Court case).

This because the whole case was thus narrowed and brought, at the request of plaintiff in error, to that one point and question, that is, as to whether said dead body was that of Hillmon or not; and as that was a question of fact for the jury to determine, we submit the case should be left as the jury determined that matter by finding the verdict it did, which was to the effect—as applicable to the case, evidence and said requested instructions Nos. 1 and 28—that said dead body was the corpse of Hillmon.

Present Claim of Double Defense Pleaded and Numbered Only as One.

As we understand plaintiff in error from what it said in its petition for a writ of certiorari and brief in support thereof, it intends to claim here and ask this Court to rule that in and by the aforesaid second ground of defense it had *deep buried*, and pleaded a second, other and further unnumbered ground of defense, to the effect that its aforesaid policy of insurance so sued and recovered on was always void, that is, was void from the time it was made, and was not ever a valid or existing contract, because it claims that in that second ground of defense it plead that John W. Hillmon, Levi Baldwin and John H. Brown conspired to procure, and procured, that policy with a fraudulent intent on their part to cheat and defraud plaintiff in error out of the amount thereof, and that it was not and is not material whether the aforesaid dead body so brought from Barbour County to Lawrence as aforesaid was that of Hillman or not, or whether he was alive or dead, or if dead when or how he came to his death, but that all such matter about his death, or whether he was dead or not, was entirely immaterial as to the matter of such now claimed defense.

In other words, we submit that plaintiff in error is now here seeking to obtain a decision of this Court to the effect that without having made appropriate allegations to entitle it thereto, it could and should have been permitted to introduce the excluded evidence, and also that without requisite and appropriate allegations or evidence it was entitled to

such refused instructions, as to all which we submit plaintiff in error is wrong.

That such intent, even if alleged and proven, would not constitute a defense to the action is shown by the numerous cases to the effect that an intent on the part of one party to a contract to not perform or abide by, or to act contrary to the express or implied provisions or conditions thereof, will not vitiate the contract unless followed by actual injury resulting and accruing to the other party thereto in pursuance and as a consequence of carrying into execution such intent.

And the cases and authorities hereinbefore cited in relation to the matter of said 2nd plead defense, show the same rule, and that to make any such supposed intent material, facts must be alleged and proven showing that injury resulted and accrued to plaintiff in error because of such supposed intent, and that mere general allegations of fraud and conspiracy, unless accompanied with allegations of facts sufficient to show the alleged fraud and conspiracy, and resulting injury to plaintiff in error, in pursuance and as a consequence of such intent and execution thereof amount to nothing.

SAID POLICY AND THE CONTRACT THEREBY SHOWN WAS A LAWFUL CONTRACT.

And it is not claimed by plaintiff in error that the policy was issued in consequence of any false representation, or that any statement in the application therefor was untrue, nor that Hillmon came to his death because of, or in pursuance, or as the consequence of carrying into execution any alleged or claimed intent or conspiracy, but, on the contrary, alleged he was living; and therefore we submit that the numerous cases referred to in the brief of plaintiff in error in support of its application for the writ of certiorari, and which we suppose it will cite in such brief as it may file herein, are not in any manner in point or applicable to this case in any view that can be taken of it, this because cases

showing that a policy can be defeated *if certain* statements made in the application for a policy are untrue, or *if* there is a breach of certain warranties, or *if* a policy is obtained with intent to *commit suicide* on the part of the insured, and that the insured in pursuance of *such intent* commits suicide, as was alleged in said suicide cases as we understand them, that then the policy can be avoided, are not in any manner applicable to this case. If plaintiff in error had for a fourth defense, or in said second defense in addition to the allegations therein, plead that John W. Hillmon came to his death by *suicide or otherwise in pursuance of* and *to execute and carry out an intent on his part* existing at the time the policy was applied for and issued, *the case would have been entirely different;* and if it had in such supposed fourth defense so plead that Hillmon so came to his death, *the issues* would have been *entirely different* from what they were and are, and it would then, notwithstanding its general denial in its said answer and such second defense as it actually plead, *have stood for t ue*, and been *admitted* in and by the pleadings that Hillmon *was dead*, and not alive, that is, such suggested and supposed fourth defense in that case would have been the reverse of the second defense it actually plead, and defendant in error would not have been required to have introduced any evidence to prove that Hillmon was dead.

We see by reference to the above mentioned Section 84 that parties are required to state the *facts* constituting their respective claims and defenses.

And if plaintiff in error had in its said answer in or by such suggested and supposed fourth defense, or by allegations further and other than any actually made in that answer, alleged that Hillmon came to his death in pursuance of and to execute and carry out any such intent, then such allegation of Hillmon having so come to his death by suicide, or intentional killing, accidentally or otherwise in pursuance of such intent, would have dispensed with proof of the death of Hillmon, and been an admission against the whole answer, leaving it for true that Hillmon was dead, because under the laws of Kansas in relation to the rules of

pleading a fact admitted, that is an admission in *any* part of an answer, is good against any other part thereof, that is, against any other part of such answer, which rules of pleading were and are applicable to the Federal Courts in Kansas, and that such is the rule of pleading and would be the effect of pleading such two irreconcilable propositions, as that Hillmon so came to his death, *and was also alive and not dead*, see the following cases decided by the Supreme Court of Kansas:

Wiley vs. Keokuk, 6 Kan. 94.
Butler vs. Kaulback, 8 Kan. 668.
Yandle vs. Crane, 13 Kan. 346.
B. of E. vs. Shaw, 15 Kan. 41.
Ballinger vs. Lantier, 15 Kan. 611.
Bierer vs. Fretz, 32 Kan. 337–38.
Meixell vs. Kirkpatrick, 33 Kan. 295.
Losch vs. Pickett, 36 Kan. 222.
Tweedell vs. Warner, 43 Kan. 603.

And of course those Kansas cases are conclusive in this Court and were conclusive in the trial court as to the rules of pleading and evidence. (Sec. 914, R. S. 1878.)

In the opinion of the Supreme Court of Kansas in the case of Losch vs. Pickett, 36 Kansas, 222, the following language is used:

"A thing cannot be true and untrue at the same time; and any pleading containing allegations made by the same party, both affirming and denying a particular thing, carries falsehood upon its face." (Butler vs. Kaulback, 8 Kas. 668, 671 to 673; Wright vs. Bacheller, 16 id. 259; Wiley vs. Keokuk, 6 id. 94, 105.)

In consideration of the above cited cases which show that general allegations of conspiracy and fraud *are without legal effect*, at least are *not allegations of any facts or statements under which proof or evidence can be given*, and are mere surplusage; and further, considering that plaintiff in error only plead in substance that Hillmon was alive and not dead, and that *he, a living man* with others *pretended* to plaintiff in error that the aforesaid *dead body* was his, as its claim of the

facts done, constituting conspiracy, fraud, etc.; and further, considering the aforesaid sections of statutes and the decisions of the Kansas Supreme Court in relation to contradictory allegations in the same answer, we submit that plaintiff in error did not (even if it could have) in its said second ground of defense plead a double defense, or two defenses, it certainly it did not therein plead any defense, to prove which would bar the action, if the aforesaid dead body was the corpse of Hillmon.

The fact that the policy sued on contained the clause or condition set out at r. 6, 7, has no bearing upon the question discussed, for the reason already several times pointed out, that the pleadings in the case do not allege any breach of said conditions or set up any facts showing that the plaintiff in error was entitled to avail itself of any breach of said conditions.

And further, if instead of pleading such supposed 4th defense, plaintiff in error in its 2d defense, in addition to what it did allege therein, had also alleged the matter of such supposed 4th defense, it is apparent that it would not, by so doing, have escaped any of the consequences of making such allegations in such supposed 4th defense, but would have only in closer connection have shown it was admitting its allegation that Hillmon was still alive, was untrue—all which we submit shows the absurdity of plaintiff in error's now claim, to the effect that it had any defense plead in that 2d numbered defense other than one to the effect that Hillmon was not dead.

And further, in this connection we request attention to the last clause in the aforesaid Section 94, which is to the effect that each defense must be separately stated and numbered; and as plaintiff in error stated all the allegations it made about fraud, conspiracy or intent in one ground of defense, under a single number, it surely ought not now to be heard to claim or urge that it in or by its 2d defense stated, or intended to state, anything in conflict with its allegations therein, or that it had two defenses therein alleged, one hidden—not even conceived—until recently, but to bring which forth it is now struggling, in the face and contrary to the

allegations therein and also contrary to the purport and effect of the cases and authorities hereinbefore cited in relation to the matter of that 2d defense.

And if plaintiff in error, when it filed that answer, had intended to plead two defenses in that 2d ground of defense, or supposed it had, it would certainly have stated and numbered them separately, surely it would not have left the two in a singly numbered defense, in which the *only issuable* and *provable* facts alleged were to the *effect* that Hillmon was *alive* and not dead, and to have met such issue as plaintiff in error would now like to have this Court interpolate into and construe said 2d defense to contain, would have required additional proof on the part of defendant in error to meet, if plaintiff in error could have made a *prima facie* case supporting such not plead defense.

And if there is any doubt about that matter of, or as to, the meaning and true construction of that 2d ground of defense, we refer to the rule of law that a pleading must, where there is doubt as to its meaning, be construed most strongly against the party whose pleading it is.

4 Ency. Pl. and Pr., 759, and notes.

IMAGINARY DEFENSE.

And further, we see from the authorities above cited, as well as by the plain language of the 2nd defense, as any one learned or unlearned in the law would understand it, plaintiff in error made and limited the issuable allegations therein to be, and to depend on, the question as to whether the herein mentioned dead body was the corpse of Hillmon or not, but notwithstanding it so did, *it now in substance* and *practical effect asks* this *Court* to *consider* and *construe* that 2nd ground of defense as though all and the only issuable allegations therein were struck out thereof, and only the surplusage and immaterial matter of aggravation about conspiracy, etc., left therein, and that although if that had been done in the trial court, and if this Court would now here consider those issuable allegations struck out thereof, we see

from the above cited cases and authorities, that then it could not introduce evidence under or because of what then, after such striking out, would be left therein, yet it asks this Court to ignore and disregard the above cited and referred to cases and authorities and rules of law, in relation to pleadings and evidence, and consider and decide this case and its aforesaid assignments of error, Nos. 64 to 72 and 87 to 92 and 106, and others of similar import, as though not only the *only issuable allegations* in that 2nd ground of defense were struck out thereof, but also as though there had been, when said answer was filed in 1881, and ever since in lieu of such so stricken out issuable allegations, such *other* and *different* issuable allegations inserted and made therein as this Court can imagine (if any such there be), as would have made a defense, if proven, all which accommodation it asks without withdrawing those issuable allegations, *really therein* to the effect that Hillmon was still alive and not dead, and notwithstanding it tried the case, and asked instructions on the theory that there was a question made by it as to whether the aforesaid dead body was that of Hillmon or not, and however much it might be appropriate to turn investigation of some cases into moot court proceedings after the pleadings are filed, we submit that it ought not to be done to such extent as asked for by plaintiff in error herein in relation to the matter of the excluded evidence and those refused instructions, and said as pleaded 2nd defense.

And Further, in Addition to What We Elsewhere Herein Say With Reference to the Excluded Questions and Testimony Referred to in Said Assignments of Error Nos. 64 to 72 Respectively, Relating to Witnesses Phillips, Blythe, Crew and Carr on the Conspiracy Question.

Defendant in error does not directly or indirectly, for any purpose or in any manner, claim through or under Levi Baldwin, the person that plaintiff in error sought by the excluded evidence to show made certain statements. She does not

claim through Levi Baldwin, under or by virtue of any act, or saying of his, she is not in any manner or matter in privity with him. Plaintiff in error did not allege that defendant in error and Levi Baldwin were co-conspirators, and therefore we submit that all the excluded evidence was incompetent as against defendant in error as mere hearsay.

And as she does not claim through or under Baldwin any transactions between him and any others whether acts or talk ought not to injure her as is shown by the maxim that "a transaction between two parties ought not to operate to the disadvantage of a third," found in Broom's legal maxims, 704 (6th Am. of 4th London ed.)

That said supposed statements of Baldwin were mere hearsay and not admissible, see—

2nd Law of Evidence (by Jones) 673 to 681, Secs. 299 to 302.
1 Greenleaf on Ev., Sec. 124.

And in this connection we also refer to the fact that defendant in error does not in any manner claim under, through or in privity with John H. Brown, or any act or transaction of his, and that therefore irrespective of any other reason his narrative, written statement (r. 1284-6) was not evidence against her of anything therein stated, but was mere hearsay.

The words, "AND DIVERS OTHER PERSONS TO THE DEFENDANT UNKNOWN" in said second ground of defense cannot be held to have applied to defendant in error because she certainly was known to it, it had issued said policy to her, she had sued it thereon before said answer was filed, and, therefore, it is conclusive that plaintiff in error did not by use of those quoted words in that pleading mean to allege that she was a party to any conspiracy or fraud.

It was not in said answer alleged that defendant in error was a party to any conspiracy. (R. 18.) In the opening statement to the jury it was not, by plaintiff in error, claimed she was party thereto. (R. 138.) At the trial plaintiff in error conceded it had not alleged she was, by asking leave to amend so as to allege she was, so as to introduce a new issue into a case long pending. (R. 1619.)

The opening statement at record 138, is, we submit, conclusive against plaintiff in error that it did not claim and went into the trial on the proposition and statement to effect it did not claim that defendant in error was party to any fraud or conspiracy.

Lindley vs. R. R. Co., 47 Kansas, 432.
Oscanyan vs. Arms Co., 103 U. S. 261.

And further during the trial plaintiff in error further conceded it had not alleged that defendant in error was party to any conspiracy or fraud, (to-wit: that of trying to palm off the dead body of another for that of her husband) by asking leave to amend its answer, so as to allege she was (r. 1619). And of course the Court at that late day, eighteen years after that defense and answer had been filed, and in view of said opening statement, properly refused to grant such leave backed as it was by the further fact that there was not any evidence showing she was ever a party to any conspiracy or fraud; and further as to that matter, we here refer to the hereinafter part of our brief which relates to assignment of error No. 73, relating to the matter of that refusal as though here repeated in appropriate form.

Therefore the law about what co-conspirators say whilst engaged in a conspiracy was not applicable in this case as to anything Baldwin could have said at any time or under any circumstances, and therefore, irrespective of any other reason, we submit the Court properly excluded the offered evidence.

And further, that the excluded statements of Levi Baldwin were not competent against defendant in error under any rule of law in relation to conspiracy (and the same objection is good against the written statement), see the cases of—

The State vs. Johnson, 40 Kansas, 268.
Logan vs. U. S., 144 U. S. 309.
Conn. M. Life Ins. Co. vs. Hillmon, 107 Fed. 839.

None of them were made, or claimed to have been made, in or about or to carry out anything which could have hurt plaintiff in error, but were merely *idle talk*, *hearsay*, etc.

The contract of insurance was a lawful contract. Plaintiff in error issued the policy sued on after and when it knew that thereby it insured the life of Hillmon for the last $5,000 of the total insurance on his life, as his application, set forth at r. 180, etc., showed; and after through what A. L. Selig, its agent to procure that last insurance and the premium paid therefor (r. 1496, 1524), knew and had notice plaintiff in error had been for months negotiating with Hillmon to procure premiums for such insurance as shown by that policy, and that it only got opportunity so to do (to get such premium) because Hillmon was not willing to accept a policy in an accident insurance company, which by its terms prohibited Hillmon from carrying fire-arms, and riding fast after stock, all as shown by the testimony of A. L. Selig at r. 1496 to 1526.

And we submit there is not any rule of law entitling plaintiff in error to any of the excluded evidence to prove any allegation by it made, or to disprove any allegation made by defendant in error, even if it had alleged she was a party to a conspiracy. What those allegations were, how the pleadings were to be construed, and the meaning and effect of the language used therein, is shown by hereinbefore cited cases, and we submit that the excluded evidence was utterly and entirely incompetent, hearsay, and not in any manner relevant to any issue in the case.

And further, there was not any competent evidence as against defendant in error, of any conspiracy, offered.

That the written statement (r. 1284–6) was not competent evidence against her to show a conspiracy, or for any purpose, we refer to what we herein say in relation to assignment of error No. 105, particularly to the subdivisions thereof, which show reasons why that written statement was not evidence competent to prove conspiracy or anything against defendant in error because of the wrongful acts of plaintiff in error and its assistants and agents, by which it procured the same for wrongful uses and purposes, as well as because of the time when it was procured—long after the dead body was buried—which shows that the written state-

ment, even if it had not been false, only pretended on its face to be a narrative of past transactions, and was merely hearsay.

In this connection we refer to what we hereinbefore say about that paper not being evidence against defendant in error, and the cases on that subject we cite in relation to the matter of assignment of error No. 105.

And further, the testimony offered and excluded, which is referred to in assignments of error, Nos. 64 to 72, was properly ruled out, because it consisted of hearsay and conclusions, and did not come within the rule, that declarations of alleged co-conspirators in futherance of the conspiracy, are admissible, as well as for the many reasons before urged, also because plaintiff in error had not alleged that defendant in error was a party to any conspiracy, or introduced evidence competent against either her or John W. Hillmon, showing that either had done any unlawful act, or any lawful act in an unlawful manner, or any act connected with insurance matters, other than to pay for and receive policies of insurance, which it was lawful to do, and the premium for which, as to the policy sued on, plaintiff in error still holds, and we submit that a mere glance at the testimony ruled out is sufficient to show that it was inadmissible for any purpose, in fact was not evidence at all, but mere rumor and hearsay.

In order to make the declarations of one alleged conspirator (not a party to the suit) admissible against his alleged co-conspirator, who *is* a party, the conspiracy must first be clearly shown *aliunde*. The rule is different perhaps where all of the alleged conspirators are parties, for in such case it has been held that the admission of each conspirator may be introduced to prove the conspiracy as to him (Baldwin was not party to the suit).

In this case it is not alleged that the defendant in error or any party to the suit was a conspirator, but it was attempted to introduce as against the defendant in error the declarations of third persons to prove that such third person and other third persons were co-conspirators. The declara-

tions of co-conspirators, to be admissible against other than the one making them, must of course be made in *furtherance* of, and not in frustration of the common object, and the existence of the conspiracy cannot be shown by the admission or declaration of one conspirator. (1 Jones on Evidence, Sec. 255.)

If such be the rule as applied to those alleged to be conspirators, upon what principle could the declaration of Levi Baldwin to Crew and others be introduced against defendant in error, who is not alleged to be a conspirator? It requires a very active imagination to see anything in the alleged conversations between Levi Baldwin, Crew, Dr. Phillips, Blythe or Carr, as set out in the brief of plaintiff in error, pp. 37 to 42, that can be characterized as "in furtherance" of a conspiracy. Certainly the statement by Baldwin to Crew that he had furnished money to insure Hillmon's life is mere narrative and hearsay, and not in furtherance of a conspiracy, even if it were conceded that a *prima facie* case of conspiracy had been proven, which we deny.

The rule as to such declarations seems to be well stated in the case of State vs. Johnson, 40 Kansas, 268, as follows:

"To make the declarations of one conspirator evidence against the others, they must be made in furtherance of the common criminal design. Mere admissions or narrations of what has taken place, which have no tendency to promote the common criminal intent, are inadmissible against anyone but him who made it.

"When the conspiracy has ended, or the crime involving conspiracy has been consummated, the admission of one in the absence of the other conspirators that he and others participated in the crime is a mere narrative of a past occurrence and can affect only the one who makes it," citing numerous authorities, and as such declarations would not be competent evidence as against one alleged to be a co-conspirator, for a much stronger reason such declarations would not be competent against a party not charged to be a member of the alleged conspiracy. We insist that all of the evidence excluded by the Court, the exclusion of which is complained of, was prop-

erly excluded for the reason that the same was hearsay and otherwise inadmissible against the defendant in error for the reasons above given.

We have before urged that the whole of the matter, pleadings, evidence and instructions, relating to any claimed conspiracy, was immaterial and not relevant to any material issue, and that the allegations in the answer of a conspiracy were immaterial matter. That we are correct as to this as applicable to Baldwin's idle talk, see the case of—

Union Mutual Life Ins. Co. vs. Thomas, 83 Fed. 803 804, 805,

and the other cases here before referred to in relation to the matter of the second defense pleaded in the answer.

If the dead body brought to Lawrence in April, 1879, was the corpse of John W. Hillmon, then the insurance companies were not harmed by any conspiracy, even if there had been one, and the jury by their verdict determined that it was.

And further, for reasons before shown, the law about what co-conspirators say whilst engaged in a conspiracy was not applicable in this case as to anything Baldwin could have said at any time or under any circumstances.

But further, as to the rejected evidence of Phillips, Blythe, Green and Carr, neither the time of the talk with either of them, nor the circumstances under which the same is claimed to have occurred, was such as to have made anything said by Baldwin in any such talk, competent or admissible against the defendant in error, even if requisite allegations to make proof of conspiracy admissible had been made in the answer, and particularly is this true in the light of the company's answers and its admissions made in its opening statement to the jury, which exonerate Mrs. Hillmon from being a participant in any conspiracy; and even if she had been alleged to have been one of the conspirators, this testimony was not competent or admissible as against her, because it did not pretend to be statements made in the furtherance of any conspiracy, or while it was being carried on, or in any wise connected with any, and, as already stated, the rule invariably is

that it isn't every remark or statement made by a conspirator that is competent as against his co-conspirators, but only such things as are said in the furtherance of the conspiracy, or in carrying it out, or that is in some way incident to it.

As to the excluded testimony of Crew, whom it is claimed would have told about some alleged debts that were owed by Baldwin, it may be also said that it was an attempt, on the part of the company, to prove the contents of papers, notes, mortgages and other written evidences of indebtedness by oral and incompetent testimony, incompetent because it was not the best evidence.

If the contention of plaintiff in error in this particular was correct, then Mrs. Hillmon must be held responsible for and her rights may be affected by, every word that Baldwin or any man plaintiff in error might have chose to allege was a conspirator, may have said to any person, and under any circumstances between the fall of '78 and the spring of '79. Such a contention, we respectfully submit, is erroneous, because if the sum total of many men's statements made in the course of six or eight months were gone over and every word culled out that might be distorted into evidence of a conspiracy, then almost any sort of a conspiracy could be proven from the utterances of almost any man. It would not require the ingenuity of learned counsel to make from the fragmentary remarks of almost anybody, during the course of many months, a Mosaic that would contain any design that the artist might require. And neither defendant in error or John W. Hillmon were any more responsible for the utterances of Levi Baldwin than of any other man, neither acted or claimed under, through or with him, in any matter or manner. It is not even pretended either was present when Baldwin is claimed to have made the excluded statements, nor was he then acting with or for either of them in any manner or matter—but the same were conversations merely between strangers to the suit, and also strangers to the contract sued on, none of them interested in any manner in the litigation or result of the suit; defendant in error does not in any manner claim under or through Baldwin or any act of his.

It is not even shown that the conversation was had whilst anything was being done by Hillmon or defendant in error about procuring the insurance, and it is impossible to imagine how anything Baldwin is claimed to have said to Dr. Phillips could have been in furtherance of or could have promoted any conspiracy.

As before shown, Hillmon was proposing to go into stock ranching business. Levi Baldwin, shortly after the death of Hillmon, went into similar business (r. 716 to 719); whether he alluded to such business in his talk with Carr, is perhaps not necessary to guess on.

And surely it was not competent to prove by conversation between Baldwin and Crew that Baldwin had previously paid part of the premiums; that would be narrative of past transactions.

40 Kansas, 268, and the other cases herein cited in relation to hearsay and narratives.

And also that it was not competent to prove by anything he said that he was or had been agent of defendant in error. Agency cannot be thus proven.

Donaldson vs. Everhart, 50 Kan. 718, 724.
Railway Co. vs. Kinman, 49 Kan. 631.

And, of course, it was not competent to prove by oral evidence that Baldwin had made such notes, mortgages or other papers as mentioned by Crew in his deposition.

PLAINTIFF IN ERROR HAD FULL OPPORTUNITY TO CROSS-EXAMINE BALDWIN AS A WITNESS, AS SHOWN BY THE RECORD, 684 TO 719; it was competent to have asked him by way of effort to impeach him as to anything he might have said to either Crew, Dr. Phillips, Blythe or Carr, unless his answers, whatever they might have been, would have been conclusive, because relating to a matter irrelevant and collateral and, therefore, conclusive.

1 G. on Ev., Sec. 449,

and then, if he had denied, etc., plaintiff in error could, if the same was material to the issues, have called Crew, Dr. Phil-

lips, Blythe and Carr to prove he said so-and-so, but plaintiff in error did not choose so to do, or to allege that defendant in error was a co-conspirator when it filed its answer.

And further, any claim plaintiff in error may make to to the effect that the Court *held* there was a *prima facie* case of conspiracy shown—as against defendant in error—is rebutted by what the Court charged the jury in that part of its instructions contained in the paragraph or subdivision thereof, partly on each of pages 1920–1921 of the record.

Plaintiff in error and its associate insurance companies having alleged conspiracy of Hillmon, Brown and Baldwin, the trial Court (erroneously, however, we claim) permitted in evidence every act and saying of John W. Hillmon, and of either John H. Brown or Levi Baldwin done or said in the presence of John W. Hillmon, thus giving the insurance companies the widest latitude on the conspiracy question it could, giving full force to any such claim made, because Hillmon had procured the insurance; but there was no competent evidence that Baldwin paid for or procured any of the insurance or helped so to do. And, also, admitted such other offered evidence as it deemed competent; merely stopped at such evidence as it thought not competent under the above mentioned issues, or because of some rule of law requiring exclusion.

And, further, there is not any evidence in the case that would be competent as against John W. Hillmon on any issue in any imaginable case that he was party to any such, as alleged, conspiracy; and for that reason, irrespective of any other, we submit all of the assignments of error relating to the conspiracy qnestion referred to in any specification of error, whether relating to evidence excluded or to instructions given or refused, are immaterial, and not matter of reversible error. Surely, unless there was evidence competent, as against Hillmon, of transactions occurring before the killing on 17th March, 1879, sufficient to prove he was a conspirator as alleged, we submit the whole alleged conspiracy matter is immaterial to the case as it now is here in this Court, and we submit the Court cannot find in the record competent

evidence sufficient to prove *prima facie* that Hillmon so conspired; and if we are right in that, it follows that all assignments of error which relate to any claimed conspiracy, should be disregarded or overruled.

LAWFUL CONTRACT.

The Court did not err in excluding any of the excluded evidence, even if we are wrong in claiming that because of many reasons herein urged it was incompetent and mere hearsay, and also not either competent, relevant or material under or as to the issues as made by the parties, because the contract of insurance was a lawful contract; it is not shown that defendant in error or that Hillmon ever did any improper act, or that either of them ever did anything in an improper or unjust or illegal manner; plaintiff in error received and retains the premium, and we submit there was not any error committed by the trial court other than such as it committed against defendant in error. The issue tendered by the second defense was fully tried, and found against plaintiff in error, on that plea as filed by it, construed by the Court as it asked the trial court to construe it, and we submit it is going beyond the limit of legitimate controversy and contention in and by now asking this Court to construe that second ground of defense as plead, to hold within its non-provable general statements consisting of surplusage and matter of aggravation, a defense that would entitle it to any of the excluded evidence, or to any of the refused instructions which relate to any supposed conspiracy question.

And that if plaintiff in error had wished to have raised in the trial court any issue that would have, if proven, vitiated the policy, either under the 1st condition in the policy (shown at r. 6–7) or for other reason, it should have plead the same, in due and proper form and taken the consequences, and not seek now to claim it had a defense in that subdivision of its answer *in conflict with what it alleged therein*, certainly not included within its allegations therein to the effect

that Hillmon was alive and not dead, and to which the general allegations of fraud, conspiracy and intent, were as shown by above cited cases limited.

INSTRUCTIONS REFUSED AND CHARGE GIVEN RELATING TO THE CONSPIRACY QUESTION.

As to refused instructions Nos. 36, 37, 38 and 47, mentioned in the aforesaid assignments of error Nos. 87, 88, 89 and 106 (r. 1997–8–9 and 2006), and as to so much of the instructions by the Court given to the jury as copied in assignments of error 91 and 92 (r. 1999, 2000), we submit that there was not any such exceptions taken as would entitle plaintiff in error to be heard here in relation to the matter thereof, as we have hereinbefore urged in our preliminary objections.

But if the Court shall overrule our objection as to that matter, then we submit that what we have hereinbefore said in relation to the issues in the case on the subject of conspiracy and fraud as to the meaning, force and effect of the second defense plead by plaintiff in error is a full and sufficient answer to those several assignments of error, but lest the Court should differ with us in that respect, then, if it does, we submit further in relation thereto that the Court did not err in refusing any of those instructions or in giving any mentioned instruction to the jury.

And as to each of those refused instructions we submit that as plaintiff in error by the herein before mentioned instructions Nos. 1 and 28 (r. 1904, 1909), ignored the conspiracy question, and thereby requested the Court to instruct the jury (among other things not necessary to consider in this connection, but fully argued and shown improper by what we say in relation to assignments of error No. 85 [r. 1996] and No. 99, [r. 2003], and which is here referred to so far as appropriate in this connection as though here repeated) to the effect that the real question was whether the aforesaid dead body was that of John W. Hillmon or not, and as the Court adopted that view and theory of the case, including construction of the pleadings, and as to what was in

issue in the case, as so requested by plaintiff in error, and as by those refused instructions Nos. 36, 37, 38, 46 and 47, a different and conflicting view and theory of the case, including construction of the pleadings of the parties, was asked by plaintiff in error, it cannot now be heard in relation thereto, because a party should not and has not a right to request a court to adopt at its request a view or theory of the case different and in conflict with such as it adopts at the request of such party, plaintiff in error in this case, and from that it follows that this case is now here to be considered the same as though those refused instructions Nos. 36, 37, 38 and 47 had not been asked for, or assignments of error Nos. 87 to 92 and 106 made or shown in the record at all—this because a plaintiff in error cannot be heard to urge a view or theory of the case which the case so as shown adopted as requested by it.

21 Ency. Pl. & Pr., 607–8–9, and cases there cited.

But in addition to the herein before urged objections to the matter of those refused instructions Nos. 36, 37, 38 and 47 respectively, we request the attention of this Court to further objections thereto, which of themselves, irrespective of anything before said, shows sufficient reason why it was proper and the duty of the Court to refuse to give the same to the jury.

ASSIGNMENT OF ERROR No. 87. (R. 1997.)

Relating to Refused Instruction No. 36. (R. 1911.)

An analysis of said instruction No. 36, and of the charge of the Court to the jury, will show that the plaintiff in error was not prejudiced by the refusal of the Court to give it, even if it had been sound, because the general charge of the Court, as shown at r. 1917–18, 1919, 1921, included so much thereof as could in any event be of use to plaintiff in error, and was much more favorable to it than the propositions embodied in the refused instruction, which was to the effect that if *all* of *four* principal propositions were true, viz: First, that if there was a conspiracy to *procure* and *present*

the dead body of a person *other* than that of Hillmon, and second, that if they did in fact produce a body *not that of Hillmon*, and falsely pretended that it was his body, and third, that *if the plaintiff knew* of the attempted deception and endeavored to further it, then fourth, that she thereby adopted such fraudulent acts and became a co-conspirator.

Now the Court eliminated the circumlocution, and instructed in its general charge that if only *one* of said propositions were true, viz: the second, that is, *if the body produced was not that of Hillmon*, then plaintiff could not recover, whether there was a conspiracy and whether she knew there was a conspiracy or not. (R. 1917–18, 1919, 1921.)

How can the plaintiff in error complain that the Court refused to give an instruction which directed the jury to find defendant in error adopted a conspiracy if all of three facts were proven, when the Court did instruct the jury to find for it if only *one* of such facts was proven.

And further, there was not in the aforesaid answer the pleading of plaintiff in error, on which the case was tried, any allegation that defendant in error *had been told* and *was informed*, and was *thereby notified* that Levi Baldwin, John H. Brown and John W. Hillmon had confederated or conspired together to procure from insurance companies policies sued on for the purpose and with intent to procure and fraudulently present to the insurance companies a dead body of another person than the insured as that of the insured, or that she knew of any such (pretended) attempted deception or fraud. And therefore there was no issue on such matter, as the Court was asked to instruct the jury concerning, by the instruction No. 36, and therefore it was proper for the Court to refuse that instruction, and also to instruct the jury as it did.

ASSIGNMENT OF ERROR No. 88. (R. 1997-8.)

Relating to Refused Instruction No. 37. (R. 1911-2).

That instruction No. 37 analyzed amounts to this: First, that if Hillmon, Brown and Baldwin formed a conspiracy to obtain a policy on Hillmon's life with the intent to produce the dead body of another, and second, that if "they procured and accepted said policy of insurance," then, third, that plaintiff could not recover "even though the dead body actually presented to the defendant was really that of said John W. Hillmon." Now this instruction in addition to other herein before urged objections thereto was faulty, and was properly refused for the reason alone that the second proposition had no basis or support in the evidence. There was no evidence tending to show that Hillmon, Brown and Baldwin "procured and accepted" the policy. Even if an inference could be drawn from any of the legal evidence (regarding it for that purpose as undisputed) that Hillmon obtained the policy with any such fraudulent design, which we deny, there certainly was no scintilla of competent evidence that the three jointly "procured and accepted" the policy. Such an instruction could not but be misleading, and suggest to the jury that they might draw upon their imagination rather than confine themselves to the testimony.

But the greatest vice in this instruction is that it is wholly outside of any issue tendered by the pleadings. To have given such instruction would have been to disregard the pleadings and submit to the jury a defense that had not been set up or presented by the answer, and as to that we refer to what we elsewhere herein say as to what the issues in the case were.

The answer of the defendant below sets up in defense a denial that Hillmon was dead, as claimed by the plaintiff, and charges that the body brought from Medicine Lodge and presented at Lawrence was a fraudulent substitution, and falsely pretended to be that of Hillmon.

The second paragraph of the answer of plaintiff in error analyzed and reduced to its lowest terms, amounts to this

and nothing more, viz: That which is simply equivalent to alleging that Hillmon was not in fact dead and nothing more. Does the second paragraph of the answer of the plaintiff in error (page 18) amount to anything more than a denial that Hillmon was dead? Does it perform any office that would not have been performed, or admit of any proof that would not have been admissible under an answer that simply denied the allegation in plaintiff's petition, that Hillmon was dead? We submit it does not.

During the twenty years of litigation never had it been claimed by plaintiff in error that the body was that of Hillmon, and that he had come to his death in an attempt to perpetrate a fraud upon it, but always that the body was not that of Hillmon, but was in fact that of one Walters, who had been murdered by Hillmon.

The verdict of the jury, in view of the instructions of the Court, necessarily implies that they believed and found that the body was that of Hillmon. How, then, can it have been material whether or not there was a conspiracy to produce a false body, in view of the allegation in the answer that the body produced was in fact a false body, and of the instructions of the Court that if it was a false body the plaintiff could not recover, whether there was a conspiracy or not.

The contention of plaintiff in error seems to be that where an act is claimed to have been done by a plaintiff which, if done by him, constitutes a defense to his action, that some additional force is given to an answer by not only alleging that the plaintiff performed the act, but that he conspired beforehand to do so.

We respectfully submit whether the allegation that Hillmon, Brown and Baldwin conspired to produce a false body, and did produce a false body, means anything more than that the body produced *was* a false body; and in this case whether it means anything more than that the body produced was not that of Hillmon or that Hillmon was not dead.

No notice had ever been given to defendant in error by the pleadings that the plaintiff in error would claim that the body produced, though that of Hillmon, came to its death

under circumstances that vitiated the policy, until after twenty years of litigation, in which every effort of the plaintiff in error had been directed to show that the body was that of Walters and not that of Hillmon. After this long period of litigation plaintiff in error seems to have lost confidence in its ability to ever convince any jury that the body was not that of Hillmon, and desired, without appropriate or necessary pleading or allegations in its answer, to inject an unplead defense by its instructions into the case, to the effect that if the aforesaid dead body was that of Hillmon, that he came to his death under such circumstances as to relieve the company from liability under its policy. As well might the Court have submitted to the jury a defense involving the theory that Hillmon committed suicide, or was killed in a duel, or in war, or insurrection, or in an affray provoked by himself, or in an attempt to commit burglary, murder or other felony, or that he was executed pursuant to a sentence of a court-martial, or that he came to his death by any other means or under any other circumstances that would avoid the policy, as to have submitted the defense embodied in plaintiff in error's special instruction No. 37. Not only was that defense not pleaded in the answer, but it was excluded by the answer, and wholly in contradiction thereof.

Nevada Co. vs. Farnsworth, 102 Fed. 573,

as shown by the cases hereinbefore referred to in relation to the matter of the meaning and proper interpretation of the 2d defense as pleaded.

If defendant had, in its answer, alleged that Hillmon came to his death while engaged in such scheme as mentioned in that 37th instruction, which would have been necessary before such instruction could be appropriate to any allegation or issue, the issues would have been entirely different. It would have then stood for true that Hillmon was dead.

And then, as herein before shown, because of the statutes, laws and rules in relation to pleadings, it would on the pleadings stand admitted by plaintiff in error that Hillmon was dead, notwithstanding its denials of the allegations in the

petition and reply or its affirmative allegations in the second defense that Hillmon was alive.

And further, in this connection, we request attention to what we have herein before said in relation to the 1st and 28th instructions asked by plaintiff in error, and the acceptance by the Court of the theory of the case which plaintiff in error requested it to adopt by giving so much of each of said instructions as was to the effect that the real question (then when the evidence was all in) was whether the aforesaid dead body was that of Hillmon or not.

Now to have instructed the jury as requested by said instruction No. 37 would have been giving conflicting instructions at request of plaintiff in error. Of course it would not have been proper for it to have so done.

And further, we claim the Court did not err against plaintiff in error in what it said about the conspiracy question; the conspiracy alleged was immaterial in any event. Certainly so if the dead body brought to Lawrence was the corpse of Hillmon.

ASSIGNMENT OF ERROR No. 89 (r. 1999)—Relating to Refused Instruction No. 38 (r. 1912); and

ASSIGNMENT OF ERROR No. 106 (r. 2006)—Relating to Refused Instruction No. 47 (r. 1915), further considered respectively and together.

The 38th special instruction, the rejection of which is complained of, should not have been given, because, among other reasons for rejecting it, the instruction erroneously assumes that there was evidence that tended to show that Hillmon, Brown and Baldwin, acting jointly, did "in fact procure, receive and accept said policies," when, as a matter of fact, there is not a scintilla of testimony competent against defendant in error to show that Brown and Baldwin, at least that John H. Brown, had any part in procuring or accepting the policies, and because of this assumption this instruction was misleading in the highest degree and had no proper

basis in the evidence. The only testimony in the case which by any possibility could be construed as giving any color for such an instruction, was the statement or admission of John H. Brown, which certainly was hearsay and incompetent, and made long after the dead body was buried, except as it was competent for the purpose of explaining the manner in which the release was procured, and incidentally for consideration by the jury upon the question of Brown's credibility, and to show what it was that had been procured and used as it was, as was well understood upon the trial of the case and was shown in the general charge (r. 1922–1923) of the Court, which is in the following language, and to which no exception *whatever* was taken by the plaintiff in error:

"The unsworn statements of any person which have been admitted in evidence are not evidence as to the truth of such statements. * * * The deposition of John H. Brown was read to you on behalf of the plaintiff. On behalf of the defendants evidence was introduced tending to show that he made oral declarations to W. J. Buchan, and showing that he also signed and swore to a statement contrary to his testimony given before you. The oral declarations of said Brown not under oath, and the statement signed and sworn to by him, are not affirmative evidence of the truth of any matter therein contained or mentioned, and they should not be considered by you, excepting as affecting the credibility of the evidence of said Brown, given in his deposition."

And further, all that is said in this brief in relation to the issues in the case, or relative to either of the refused instructions on the subject of conspiracy, is applicable as objection to each of those refused instructions Nos. 38 and 47.

And the 47th special instruction is indefinite and misleading to a further degree, in that it did not explain what was meant by the adverb "fraudulently," and did not define or advise the jury as to what would constitute the procuring the policy by fraud, but left the jury to attach such significance as they pleased to said word "fraudulently." In addition to this, these instructions were in conflict with other special instructions requested by the plaintiff in error,

wherein the Court was asked to instruct the jury "that the real question in the case is whether or not John W. Hillmon died at the time and in the manner in said petition alleged," and which instruction the Court gave in its general charge. (See instruction No. 1, page 1904, and special instruction No. 28, 1909, and the general charge of the Court, r. 1917–18, 1919 and 1921.)

In view of the special instructions just referred to, in which plaintiff in error invoked the Court to charge the jury that the real question involved was whether Hillmon was in fact dead or not, and the claim now made that such was not the real question, we feel justified in saying that the evident purpose of plaintiff in error, in asking its special instructions was to embody in them both the affirmative and negative of every proposition of law involved in the case, so that whichever of the instructions so asked the Court should adopt, the plaintiff in error would be able to except, because the Court must necessarily refuse to give the conflicting instruction.

Further, by the instruction No. 38 ~~in that 6th specification~~ mentioned, plaintiff in error sought to defeat the policy sued on if Baldwin, Brown and Hillmon confederated and conspired together to procure the policy for the purpose and with intent to procure and fraudulently present to the plaintiff in error, a dead body of another person than the insured as that of Hillmon and of thereby representing him to be dead.

In addition to what we have said, and the authorities we have cited in relation to ~~specification 3 and 5, as to~~ the allegations in the answer about conspiracies being immaterial, we further submit that said instructions Nos. 38 and 47 were not based on any issue in the case. By the answer (r. 18), the conspiracy charged was with reference to Hillmon being still alive. The substance of the fraud alleged in that answer was that a certain dead body was represented to be that of Hillmon whilst he was alive, making the question of defense to depend upon whether the dead body was that of Hillmon or not. The alleged substitution of the dead body of another as that of Hillmon was the only specific act of fraud alleged.

On those allegations issue was taken by filing the reply and the case was tried.

Therefore said instructions Nos. 38 and 47 were not based on any issue or evidence in the case. On that issue, to defeat plaintiff in error, what defendant in error had to do was to prove that the dead body was that of Hillmon. That was sufficiently proven, and proper instructions given on that basis. We submit it was not proper for plaintiff in error thus to attempt to change the issue, or to make any new issue, and that general allegations of conspiracy and to defraud amounted to nothing, or were limited to the specific fraud charged, to-wit: that of having actually presented another's dead body for that of Hillmon.

Such fraudulent intent as mentioned in said instruction No. 38 (or 47), as well as any fraudulent intent alleged in the answer, was immaterial and constituted no defense, as the insurance companies were not thereby injured, as is shown by authorities including decisions of this Court hereinbefore cited.

We refer to what we elsewhere say in this brief about there not being sufficient competent evidence against defendant in error or John W. Hillmon to prove a conspiracy, as sufficient reason for refusing instructions Nos. 38 and 47, referred to; and, in addition, we claim that if the dead body was that of John W. Hillmon, and that as plaintiff in error made the insurance and issued its said policy with notice that the $5,000 mentioned in the policy it issued made $25,000 insurance on the life of John W. Hillmon (r. 180 and 1523), it could not defeat a recovery on that policy without having previously, in due time, returned the premium.

> Jeffers vs. Forbes, 28 Kan. 174, 181, and cases there cited.

It never offered so to do, and further, it did not, as we have heretofore stated, in its answer plead that the policy was void because of any fraud, but only sought to prevent recovery because it claimed Hillmon was alive and not dead, in effect making and leaving the issue on all that matter merely as to whether Hillmon was dead or not practically

as applied to the evidence, whether the aforesaid dead body taken to Lawrence was the corpse of John W. Hillmon or not, as it is by the instructions of the Court given to the jury, shown the Court understood the issue made by the pleadings of the parties to be, and in fact admitted to be by plaintiff in error asking leave to amend its answer, as shown at record 1619. And by asking the Court to instruct the jury, as shown by the above referred to part of its first and twenty-eighth instructions (r. 1994 and 1909) given, as shown at r. 1917–1918 and 1921, which part of said asked instructions so given conflicts with said asked instructions Nos. 38 and 47.

And, by its opening statement to the jury, shown at record 138, plaintiff in error, in effect and substance, admitted it did not claim defendant in error was party to any fraud or conspiracy. All this in addition to the want of evidence sufficient to base such instructions on, that either defendant in error or John W. Hillmon was party to such conspiracy, or that Hillmon alone procured the same by fraud.

If it was the dead body of Hillmon that was brought to Lawrence, then in view of the pleadings and all the evidence in the case, we submit it is absurd to claim that the case should have been tried, evidence offered, or the jury instructed, on the theory that there was fraud, either alleged or proven, that could defeat a recovery on the policy.

The fact that the policy sued on contained the referred to first clause or condition set out at pages 6 and 7 of the record, has no bearing upon the question discussed, for the reason already several times pointed out, that the pleadings in the case do not allege any breach of said conditions or set up any facts showing that the plaintiff in error was entitled to avail itself of any breach of said conditions.

Certainly not if the aforesaid dead body was that of Hillmon, because, as hereinbefore shown, the aforesaid 2d defense limited the fraud alleged to the question as to whether said dead body was the corpse of Hillmon or not; and we submit that if we are wrong in that, it follows that if a party uses the word fraud in its allegations, it can ask a jury to infer it if they are possessed of imaginations that would let them

infer fraud from the amount of insurance or any other cause, without allegation, or proof of acts and doings, that would in law constitute fraud, as plaintiff in error tried to have done by seeking to get the jury to act on by such refused instruction No. 47, etc.

ASSIGNMENT OF ERROR No. 90. (R. 1998–9.)

Of course plaintiff in error cannot be heard to complain of the refusal of the Court to give instruction No. 46, therein mentioned — but the same is subject to all of the objections urged against refused instruction No. 47.

ASSIGNMENTS OF ERROR Nos. 91 and 92. (R. 1999, 2000.)

Relating to Only Portions of the Charge of the Court on the Subject of Conspiracy.

We contend that plaintiff in error has not any available exception to the part of the charge of the Court on the subject of conspiracy, set forth in either of those assignments of error Nos. 91 and 92, because there is not therein or in both together *all* that the Court said on the subject of conspiracy, and further some part of what the Court did say to the jury (we contend all thereof) on the subject of conspiracy was certainly correct, including what it said on that subject, as shown at r. 1916, 1917, 1920, certainly so much thereof as is shown at r. 1916–17, and as the exception shown at r. 1926 was *as to all* the Court said on the subject of conspiracy *as a unit*, therefore and for reasons herein before urged we submit plaintiff in error cannot be heard on the matter of those two assignments of error, Nos. 91 and 92, or either thereof, but if we are wrong in that then we contend the Court did not err in so charging the jury, and as to that we refer to what we have herein said and to the authorities we have cited in relation to the matter of conspiracy and the second defense pleaded by plaintiff in error, and claim that under the issues in the case and the evidence introduced it was proper for the Court to so charge the jury.

And still further, we submit that because plaintiff in error requested the Court to give the jury the before mentioned instructions Nos. 1 and 28 (r. 1904, 1909), and the Court accepted and adopted the theory of the case plaintiff in error so requested it to, to the effect that the real question in the case was whether the aforesaid dead body was that of Hillmon or not, that therefore plaintiff in error was not hurt by the Court charging the jury as it did, and if such was then the real question, and we not only contend it was in fact and in law, but that plaintiff in error cannot after asking those two instructions Nos. 1 and 28, be heard to claim the contrary, surely it is not in position to ask the Court to reverse the judgment because it charged the jury as it did, as complained of in those two assignments of error, particularly as it was not thereby really hurt.

THERE CAN BE NO CONSPIRACY TO DO THAT WHICH IS LAWFUL IN A LAWFUL MANNER.

Porter vs. Mack, 40 S. E. 459, and cases therein cited; s. c. 50 W. Va. 581.

And the same principle is established by other cases above cited.

And Hillmon is not shown to have done any unlawful act, nor any lawful act in an unlawful manner, nor is there any evidence competent against defendant in error that any person whomsoever did *any unlawful act* or any lawful act in an unlawful manner, in relation to the matter of procuring the insurance.

And the excluded evidence of Blythe, Carr, Crew and Phillips if it had been given would not have shown, or even tended to show, that either Hillmon did any unlawful act, or any lawful act in any unlawful manner, nor did it even tend to show that Baldwin ever did an unlawful act, or a lawful act in an unlawful manner, and still more certainly not if the aforesaid dead body was that of Hillmon, and we contend this case of Porter vs. Mack, 40 S. E. 459, shows of itself irre-

spective and independent of anything before said a full and unanswerable objection to every claim made by plaintiff in error for a reversal of the judgment complained of because of anything relating to any claimed conspiracy.

CONSPIRACY ABSURD.

And in this connection we request attention of the Court to the singularly absurd and unreasonable proposition plaintiff in error advances by claiming that Hillmon became party to any such conspiracy as claimed by it.

This because evidence in the case, when considered in the light of that common knowledge of which all men are possessed and which may be used in considering testimony.

U. S. vs. R. G. I. Co., 174 U. S. 697–8;
M. R. R. R. Co. vs. Richards, 8 Kansas, 101, 111,

not only tends to prove, but proves, not merely *prima facie*, but beyond any reasonable doubt, that on the 3d of October, 1878, defendant in error and John W. Hillmon, after having been affianced from some time in 1873, were married (r. 746, 748, 782), and that a family more or less numerous would naturally grow up around them, and not knowing how many he would leave to need maintenance if he met an untimely death in traveling in the then comparatively unsettled recently Indian raided parts of Kansas, Hillmon—beset by the agents of those who are ever ready to accept premiums—insured his life for the benefit of her he had for so long sought in marriage, taking with him his discharge as a soldier, to use as it might be to help in locating such land for use in starting the business of cattle ranching, as he should find appropriate—he a man ever active and doing something in an honest, proper and industrious manner, went on his last and ill-fated trip and came to an accidental death at the hand of his friend and companion, as many another has; and although there is not a scintilla of evidence competent against either defendant in error or the deceased John W. Hillmon that either of them ever either conspired to do, *or ever did any wrongful act*, or any lawful act *in an unlawful manner*,

yet plaintiff in error seeks to reverse the judgment against it whilst still holding tight its grasp on the premium, because it claims that a conspiracy was entered into which, to execute and make effectual, must have necessarily resulted in forever separating him from her he had so long contemplated being his companion for life, and from successful termination of which he could not hope to reap any benefit, or himself thereafter to be or to become other than a vagabond and outcast to his dying hour; and without daring to take the consequences of pleading that Hillmon *came to his death* in pursuance of a conspiracy, *that he should so die*, which would have been necessary to make any plea of conspiracy under the circumstances of the case, good as a defense, as is shown by numerous cases herein cited, it pleaded Hillmon was alive and not dead.

And having obtained the written statement, a thing *narrative* in form and of no force except as a weapon like unto a club, and release by such wrongful acts, including *threats* of polluting the administration of justice, as shown by the evidence hereinbefore referred to, plaintiff in error is now here on such altered pretended record as shown by the matter about its name on r. 1926, hoping this Court will find some such technical error in the record as will cause it to reverse the judgment, cast defendant in error into an enormous amount of costs, and give plaintiff in error opportunity to see if it cannot gather courage to allege Hillmon died in pursuance of a conspiracy that he should so die, with all its resultant effects, it being able to pay costs if it can only in effect make good its threat she could not recover (r. 771–2, 821–2), *which effect is nearly achieved*, if she has to pay the costs in this proceeding in error, which matter of costs will be proper subject of consideration if this Court shall ever consider the question as to whether it should differ with the trial court on the matter of its discretionary power, to have given or refused permission to plaintiff in error to introduce, by amendment of its answer, an undefined additional issue or pretended issue in the case, and it asks such reversal on a claim practically to the effect that this Court has a discretion to say the trial court ought to have permitted plaintiff in error to

so amend, although it did not specify any cause or reason for so doing, or present any such paper as it wished to file, if any, which would have put it in any better position than it was, as is apparent when all of the evidence and the law applicable thereto is considered and properly applied, and we contend that this Court has not right to exercise any such power over the discretion of the trial court, there not being *any abuse* of the discretion of that Court shown, and we submit the case is here, to this single, last mentioned point, for many reasons, including because of the matter of the whole case at near its close, having been requested by plaintiff in error to be treated and decided by a jury, and passed on, as they should find and determine whether the aforesaid dead body was that of Hillmon or not, on and as to which the jury found against it, and when it was defeated by the finding of the jury, we submit the whole conspiracy question was exploded, as any one should have expected such an absurd proposition as it is involved would be.

And we ask that all this matter about conspiracy be considered in connection with assignment of error No. 73, relating to leave to amend, which really is a part of the conspiracy question so involved and settled, because a party cannot divide a defense into different parts, try one, and retain another part for further use in any manner.

There was not any evidence whatever against any person whomsoever either given or offered of any conspiracy in the matter of either procuring the policy sued on or in relation to the dead body other than such conspiracy as was entered into by plaintiff in error and its assistants and agents to procure the written statement (r. 1284–6, and the release, r. 19), *and to defeat defendant in error.*

Except that as against Brown only, and that only, by and because of plaintiff in error and its assistants in the matter of trying to beat defendant in error out of her claim against it on the policy wrongfully, caused him to sign that written statement which as against all others, including defendant in error, is mere hearsay, and only a false narrative, procured by improper use of money, inducing an attorney to throw

his client, coupled with threats of improper use of money in judicial proceedings, in other words, there was *not any evidence whatever* either offered or given of *any unlawful act*, or of any lawful act done or attempted to be done *in an unlawful manner*, by either defendant in error, John W. Hillmon, Levi Baldwin or John H. Brown, other than said written statement, which was as to all persons *other* than Brown *mere hearsay* and *not competent* evidence of anything therein stated, and merely and only a false narrative, procured from him *under such circumstances* and *by* such *wrongful* means as to make and render it as *between* Brown and plaintiff in error *more its* act and document than his, and the act and document of plaintiff in error as between it and defendant in error.

And in support of this proposition we refer to the authorities cited and matters hereinbefore urged in relation to the several assignments of error on the conspiracy question as well as to those relating to assignments of error Nos. 105 and 27 to 32 and 59, all which we submit prove and clearly show our contention in this respect is incontrovertibly true.

ASSIGNMENT OF ERROR No. 73. (R. 1985, 1619.)

It was a matter entirely within the discretion of the trial court as to whether it would allow the amendment asked for. The answer was filed in June, 1881. (R. 19.) There had been five previous trials of the case, and at the commencement of the last or sixth trial in October, 1899, over eighteen years after the answer in that 73d assignment of error mentioned had been filed, the plaintiff in error by its counsel in his opening statement to the jury said to them as follows:

"The second defense is that John W. Hillmon, Levi Baldwin and John H. Brown entered into a conspiracy to defraud these insurance companies out of the money which was called for by these policies. It is said by the gentleman who addressed you that we have never claimed that Mrs. Hillmon is a party to this conspiracy; what the evidence will be deduced on that point is for you gentlemen to determine; what we say on paper is that John W. Hillmon, Levi Baldwin and

John H. Brown did conspire to defraud these insurance companies. * * * And by the way, these applications as is stated to you show that he was five feet eleven inches in height," as shown at r. 138 —and thereby in substance admitted that plaintiff in error and its attorneys appreciated and understood that it had not in its answer alleged that defendant in error was a conspirator with Baldwin, Hillmon and Brown, or with any person or persons, to cheat or defraud it; and that such admission is conclusive against plaintiff in error to the effect that it did not claim and had not plead that defendant in error was party to any fraud or conspiracy, see—

Oscanyan vs. Arms Co., 103 U. S. 261;
Lindley vs. R. R. Co., 47 Kansas, 432;

and then proceeded with the trial, and as it had not before the commencement of such last trial, nor until such trial was comparatively through with, ventured to commit itself to the statement that defendant in error had ever participated in any wrong act, and there was nothing developed at the trial indicating that plaintiff in error either after or before the making of that statement, or after the filing of that answer in 1881, discovered any fact it did not know of before that answer was filed, nor did plaintiff in error make any showing as cause for asking leave, as shown at r. 1619, to make any amendment to its answer; therefore its application was properly overruled, and further we submit there was not a scintilla of competent evidence given at the trial tending to show that defendant in error ever participated in any fraud or effort to cheat or defraud, or that she was ever a conspirator with any person or persons, for any purpose whatever, or ever did or was a party to any wrongful act or to doing any lawful act in an unlawful manner, or that the deceased Hillmon ever did either.

The leave to amend asked for was not with reference to the matter of an immaterial variance, but, as shown at r. 1619, was in substance and effect to insert the name of defendant in error in the aforesaid second defense with that of the others therein named. To have done so would have made a new issue in the case, other and different from any

therein, and was therefore properly refused at that stage of the trial.

But further, even if the Court had permitted the answer to have been so amended, we see from authorities cited in reference to the matter of the sixteen assignments of error, Nos. 64 to 72, 87 to 92, and 106, that there could not have been under said second defense even as so amended, any evidence introduced other or further than such as would be competent to prove that the aforesaid dead body was not that of Hillmon, and there was not any evidence competent to prove it was not, excluded; therefore, even if the Court had allowed such amendment, the position of plaintiff in error would not have been improved or changed in that respect, as the issue on that subject was as fully made by the petition, answer and reply filed, irrespective of what was said in that second defense, as it could be by any use of language — because, as between plaintiff and defendant, the general denial in the answer of the allegations in the petition put that as well as other questions in issue, and all evidence on that subject offered by plaintiff in error was received, no matter how remote.

And the jury were told to find for plaintiff in error if it was not the body of Hillmon, and therefore it is not important to consider whether such amendment should have been allowed or not, and as there is nothing in the record (r. 1619) indicating plaintiff in error desired to amend its answer otherwise than by the equivalent of so adding the name of defendant in error in said second defense with that of the three therein named. Of course it cannot now here be heard to claim it did.

And further, we refer to what we have hereinbefore urged in relation to the matter of claimed conspiracy, and assignment of error No. 105, to show that plaintiff in error could not properly have had stretched in its favor any rule in relation to amendments that would have let in any evidence, not submitted to the jury, which could have helped plaintiff in error, under the rules of law in relation to hearsay and narratives, and use that could properly or lawfully

be made, of either any excluded testimony or of the written statement, or other evidence in the case.

And further, in considering the matter of this 73d assignment of error, we request consideration of the fact that the trial court did not abuse any discretionary power in refusing to permit the answer to be amended, and, in so doing, to consider the last few preceding subdivisions of this brief, which relate to the conspiracy question.

WALTERS THEORY AND FIASCO.

ASSIGNMENT OF ERROR No. 74.

(R. 1985–6, 1688–9, 1690).

In Relation to the Matter of the Walters Theory of Plaintiff in Error.

Whilst in that 74th assignment of error, what the Court said to the jury, as shown at r. 1689, is not exactly correctly copied, we submit that what the Court actually said to the jury; as shown at r. 1689, was in substance and effect a mere reiteration of what this Court said relating to the same matter in its opinion in the case between the parties hereto, when it was previously here, as shown by

M. L. Ins. Co. vs. Hillmon, 145 U. S. 295–6.

And further, we submit that the trial Court did not err in that respect against plaintiff in error, but did err in what it said to the jury in that matter against defendant in error by stating to the effect that the Hillmon mentioned in the letter *was the Hillmon in this case*, because we claim that there is nothing in the case whatever to show, or sufficient to charge the jury on, that the Hillmon mentioned in the aforesaid policy, and whose dead body was brought to Lawrence as aforesaid, was the Hillmon mentioned in that letter, but on the contrary, there is much evidence to show it was not the same Hillmon, even if that letter was a genuine letter of Walters—which we deny.

In this connection we refer to the indisputable fact that there are many Hillmons in the country,—we suppose that this Court will, of course, take judicial notice that the name Hillmon, sometimes with the letter "a" in the place of "o" therein, is a common name in the country, perhaps not quite as common a name as Smith, or Jones, or Brown, but still a common name throughout the whole country, from ocean to ocean.

As we understand it, this Court, when this case was formerly here, held that the letter addressed to "Dearest Alvina," in that 74th assignment of error mentioned, was admissible in evidence on the supposition that the *writer* thereof was a *truthful person*, and would not either *himself*, or *advise another*, to tell an *untruth*, and therefore in this connection it is appropriate to examine the letter-writing record of whoever wrote the so-called Walters letters, directed, one to "Dearest Alvina" (r. 1689, 1900), another to "Henry Spreen" (r. 1713–14), the third to his brother, Charles R. Walters (r. 1742), and the fourth to "Dear Sister and all" (r. 1776). In the first cited letter, which for a person who had been absent so long —from the 24th of March, 1878 (r. 1687)—was *overdone* in the line of *gush*, instructions are given to Miss Kasten to * * * *tell an untruth* in this, whilst the letter is made to pretend he therein said to her he was going with a man by the name of Hillmon, and to tell her what he was *intending* to do, etc. (and thus got the letter in evidence under the decision of this Court, in 145 U. S. 285, 295–6), yet he is therein made to direct her, "If anyone asks you what I am doing, *tell them* that *you were not informed*," and thus by that letter, directing her to tell an untruth, and also indicating very clearly, if he actually wrote it, he did not wish others to know his doings; yet he is, by the Spreen letter, made to pretend to tell Spreen what he *intends to do*, and thus give the lodge information as to his supposed doings; and by the fourth he is made to inform his "sister and all" of supposed intentions as to his doings. Now, why pretend to wish kept secret and tell his still supposed sweetheart to tell an *untruth* on the matter of his *intended doings*, and then inform others, the lodge—"sister and all"—of his supposed intentions,

unless the real writer of those four letters was gifted with an inborn and *cultivated* inclination to * * * *tell the opposite of truth*—trying to act the part of a gusher. But however all that may be, or as to who wrote those letters, the one to Miss Kasten shows such *want* of *disposition* to be *truthful* as to utterly *impeach* any supposed veracity as to what is said in either letter about any Hillmon.

And we submit that because of the *untruthful disposition* of the writer of that letter, thus shown by it, that it is appropriate for us to now ask this Court to overrule its former decision in relation to the admissibility of that letter, and to hold that whilst the trial court gave full force to the referred to decision of this Court in relation to the letter, yet that the whole matter thereof was a mistake, we suppose arising because of this Court overlooking the *untruthful qualities* shown by that letter of the writer thereof.

And further, we contend that the evidence in the case shows conclusively, at least beyond any reasonable doubt, that the herein mentioned dead body was not that of Walters, and in support of such contention we here refer to the incontrovertible *misfit* of Walters as a *substitute* or candidate to supply the original, either of the corpse, owing among other things to certain marks on Walters, including those of the dog bite, bunion, crooked little finger, corns and straight nose, of and on Walters, and not on the corpse, and to the slight turning to one side of the nose of the corpse, corresponding to what is shown in some of the photos of Hillmon, and also to the breaking down of the tissues on one side thereof shown by photos, corresponding to what would naturally have been expected to occur in the nose of the corpse of Hillmon, and contrary to anything to be expected when Walters shall die, and to the closeness of the eyebrows of the corpse corresponding with those of Hillmon, shown by his photos, and contrary to what may, without disrespect, be appropriately termed the blaze face of Walters shown by his photos, all hereinbefore mentioned in the statement part of this brief, in connection with references to testimony in the record which proves those matters of identification, and the

misfit of Walters as a substitute for the original of the corpse.

When the written statement (r. 1284–6) was invented, there was not any such physical description of, or marks on, Burgess placed or mentioned therein, as would *therefrom* prevent him from being used as a substitute for Hillmon, but when the structure of reeds, in part composed of that written statement, collapsed and came to grief by the untimely reappearance and refusal to remain dead on the part of Burgess (r. 903–6–8, 1235–6), it became necessary, if further efforts should be made to defeat the policy, to secure another pretended victim to palm off as a substitute for Burgess, and none more promising than the tramp Walters being found, the Walters theory was developed, but that as we see, like the Burgess, also proved to be an abortion.

And further in this connection we suggest that if as the evidence shows Walters did not go on any trip with the insured Hillmon at all, it is not strange or singular that any pretended message intrusted to any Walters to deliver to any person at Medicine Lodge was not delivered (r. 1417–18, 1430.)

And in this same connection to show that Walters did not go on that trip with Hillmon, we refer to the testimony of Charles W. Schott, taken by the insurance company, under the agreement aforesaid, shown at r. 318, in May 1881, who, that is, said Schott, a witness for the insurance companies, testified that he saw Walters in Kansas City, Mo., in the spring of 1879 (r. 1666, 1670 to 1673), at a time when it was warm enough for him to be wearing clothes, there shown to be summer clothes, and the testimony of Arthur Simmons (r. 1856, 1858, 1860) to the effect that Walters worked for him in Leavenworth City, Kansas, in May 1879, two months after the death of Hillmon on Crooked Creek, and the testimony of Fannie Walters, a sister of Walters, (a witness called by plaintiff in error and the Mutual Life Insurance Company) who testified that Walters wrote to her whilst he was in Leavenworth, Kansas (r. 1795, 1808).

And further in this connection we refer to the fact that the sister, Fannie Walters, at the trial in 1899 sought to avoid

testifying to the dog bite mark on the supposed letter writer, as shown at r. 1803–4–5, after having previously sworn to having seen it (r. 1810–11–12).

And we also ask the Court to read that part of the evidence given by Charles R. Walters, a brother of the Walters plaintiff in error claims pictures of the corpse represent, set forth at r. 1753 to 1773, and to his testimony to the effect that he and others of the Walters family regarded the insurance companies' *side of the case* as *also their side* of the case, that is, as of his (and his sisters, Mrs. Rieffenach and Fannie Walters and Daniel Walters, the testimony of each of whom is set forth in the record) side of the case, in which he was testifying (r. 1765), and to his statement in a letter he had written on May 22, 1880, that he thought his brother had some *dentistry* performed on his teeth, a *few fillings perhaps* (r. 1770), and by his testimony set forth between pages 1757 to 1773, he, the brother of Walters, proves *by his own testimony*, that he was *not* above *falsehood, and that he had not hesitated to be guilty of falsehood* in connection with a *matter of efforts* made by different persons to ascertain *the truth* with regard to the *identification* of the corpse (see particularly r. 1761), and we submit that if he would state *such falsehoods* as he shows by his referred to testimony *he would* and *did*, that much of the identification of the corpse through means of the pictures by the family of the supposed to be missing Walters is *utterly unreliable and unworthy* of consideration, and considering what he so said about what he considered *our* (his family's) *side* (r. 1765), and the fact that the pictures were that of the 20 day corpse (1542, etc.) taken whilst the corpse was in the disfigured, decomposed condition shown thereby, and at r. 241–2, 225–6, and that the Walters theory in the case *was worked up through Theodore Wiseman*, as herein shown, in which he sent pictures of the corpse to some one at Fort Madison where the Walters family resided (r. 879, 880–1, etc.) *after abandonment* of the Burgess theory (r. 903-6 8) so as aforeshown by agents of plaintiff in error supposedly skillfully planted in the aforesaid written statement, shows that the Walters theory when considered with its connections and misfit of Walters as a substitute for the original of

the corpse herein mentioned, was an *invention* and *came* from a *factory* like that which with the inducements offered and given Buchan as shown at r. 1262, 1247–8, 1288, introduced and planted into the case, the written statement with its chief corner-stone the soon exploded Burgess theory.

And we request attention of the Court to the fact that the evidence showing that whenever Walters shall become a corpse, his dead body will not fit the description of the corpse brought to Lawrence in 1879, is shown almost entirely by the testimony of witnesses called by plaintiff in error.

And we submit that the letter addressed to "Dearest Alvina" shows beyond any reasonable question that it was not the outpourings of an honest, loving heart, but that on the contrary, it shows on its face that its writer, whilst *attempting* to *act* the part of a *gusher*, was so *taken* up with an *effort* to *act* the *unfelt* part of a *lover* as to use language unseemly coarse, and undoubtedly coarser and more of it than a man *really writing* to his *own* sweetheart would use, which, we submit, is of itself evidence enough to convince any human mind that the letter was an *invention* of an *architect* who overdid the part he attempted to act, and is enough to cause any anxious inquirer for truth to turn in disgust from the whole Walters theory as a fiction interjected into the case as a supplementary substitute for the Burgess *fiasco*, especially when we consider that Walters had, in March, 1878, bid his family *farewell*, about a year before the date of the pretended letter (r. 1795), and we cannot consent that Walters was coarse or imaginative enough to have either penned such a caricature on love and sentiment or written such a letter to one he is by that letter tried to be made to pretend he loved.

And of course, if that letter *is a fiction*, the same writer wrote all the others on the same subject.

And further, on this same line of inquiry as to *who wrote* those four letters, and as to the *object* of *writing the same*, (nothing ever done without an object and impelling motive) let us compare the letter to the brother, described at r. 1742, with the letters to the "sister and all," at r. 1776, and to "Dearest Alvina," at r. 1689, 1900, with reference to where

the writer of the letter pretended to say he was going, which in the two he represented as being *to parts unknown*, etc., whilst in the supposed letter to the brother he is made to know his route, and that he would soon be back to a point favorable to meet the brother and proceed with him to Leadville, Colo. And in one letter (r. 1742) the writer is made to say he is to help make a *cattle drive* from *the place of writing* the letter into Eastern Colorado; and in one to "Sister and all" (r. 1776) he is made to describe Hillmon as a *sheep trader*, and in the one to "Dearest Alvina" he is made to say Hillmon intends to start a sheep range, as a business he is to help in, something utterly inconsistent with helping to *drive cattle* into Eastern Colorado, and bringing him back to a point favorable to meet his brother to proceed from to Leadville (r. 1742), and when comparing those Munchausen letters, we submit that it is proper to inquire *if those letters really* existed before Munn, the author of the "Munn paper," copied and referred to at r. 580, etc., *interviewed* the Walters family, as shown at r. 1771, why were they not shown and blazoned forth *when* it is *pretended* the Walters family *were hunting* for F. A. Walters, instead of nothing being heard from them *until after* such *visit* of Munn, and after the sometime detective Wiseman *assisted* (see Burgess fiasco) to *develop* the Walters theory, as shown by the evidence.

And further, in this same connection, let us refer to r. 1561–2, 1564, 1575–6, where testimony of Michael Mesh and Bernard Helda is set forth, whereby plaintiff in error sought to make the jury believe that Hillmon and Brown tried to get those two men respectively to become *a victim*, one of them, Mesh, only five feet seven and one-half inches high (r. 1565), as late as from the 4th to the 10th of March, 1879, and the evening before Hillmon and Brown started and went alone on the trip which proved the last for Hillmon, and more fully as to the going alone referred to in the statement part of this brief, and we ask *why, if Walters* was *engaged* on or before March 1st, the date of the pretended letter to "Dearest Alvina" (r. 1689), to go with Hillmon *as a prospective victim*, was an effort to have Mesh, a man five feet seven and one-half inches high (r. 1565), desired to have along as a proposed

substitute victim for Walters, a man five feet eleven inches high, (r. 1653–4 and 6), or for Hillmon, a man about five feet eleven inches high, thus putting more of the tax on the *credulity* of the triers of the facts than was necessary, notwithstanding the capacity of the insurance companies to stand *expenses* they bragged of by their agent, Buchan (r. 771; 500, A. 36; 473–4, etc.), especially when this Walters theory, supplemental to the Burgess theory, is considered in connection with the visit of Walker, the companion of Wiseman at the cemetery at Medicine Lodge, when Hillmon was there exhumed, to Buchan at the court house in Wyandotte with the father of Brown (r. 1250), followed by the effort of Buchan and Walker to interview Brown (r. 1247,1281), followed by Buchan writing to Reuben Brown. (R. 545 to 548.) Buchan admitted writing to Reuben Brown (r. 1227), and getting Reuben to assist him in getting the different (r. 548–9, 550–1–2–3, etc.) statement, followed by procuration thereof, under the circumstances in the manner herein before shown soon after Brown made so-called proofs of death of Hillmon (r. 1258, 1262, 1268–9, etc.), and payment therefor by the insurance companies (r. 1247–8, 1262, 1288), and along side *all thereof* let us ask to have considered the matter of the name of plaintiff in error in the connection it appears at r. 1926.

AND WE ASK THAT THEN THE WRITTEN STATEMENT, ASSIGNMENT OF ERROR NO. 105, THE RELEASE AND THE CONSPIRACY, BURGESS AND WALTERS THEORY, AND CLAIMS OF PLAINTIFF IN ERROR, BE ALL BUNCHED AND THROWN INTO ONE OF THE SCALES OF COMMON SENSE; and after due consideration thereof, we submit that *all together* they will not move even an empty scale on the other end of the balancing lever, much less phase the evidence which shows the dead body was that of Hillmon.

And thus the so-called Walters letters and theory were dishonored and disgraced, not only in the house of its friend, the plaintiff in error, and by witnesses called by it, including his sister Fannie who received a letter from him sent from Leavenworth, Kansas, and Schott who saw Walters so late in the spring of 1879 at Kansas City, as well as by Simmons for whom he worked in May, 1879,—and by the testi-

mony of John H. Brown, whose referred-to deposition *conclusively*, so far as testimony of his could negative any claim that Walters went with him and Hillmon on their last trip, which *negative* is fully supported by the testimony of those who saw Hillmon and Brown on that trip referred to in the statement part of this brief, and also in connection with the matter of assignment of error No. 105, and surely for reasons and facts before mentioned, some thereof in relation to the matter of the 105th assignment of error, plaintiff in error is estopped from claiming Brown was not a truthful witness as to the matters he testified to, including those in relation to the man who rode a short distance with him and Hillmon, set forth at r. 502, A. 53 to 56, and 503–4, A. 70–1–2–3–4–5–6–7, and to the matter of his accidental killing of Hillmon shown at r. 345–6, 408, 411; 415, A. 762, 756; 420–1; 423, A. 855, *because if it is not so estopped* plaintiff in error will have advantage from and because of the wrongs by it perpetrated by its agents Buchan and others by means of the methods adopted, acts done, and promises and payments of money made and used in the matter of procuring from Brown, and to obtain and pay for the written statement (r. 1284–6) among other things, to injure his reputation for truth and veracity, and thus injure defendant in error; and that it cannot have such advantage is shown by the maxim to the effect "that none shall have advantage because of their own wrongful acts or conduct," on the matter of which maxim and estoppel and that the same is here applicable, we refer to the case of

Union Pac. Ry. vs. Harris, 63 Pac. 804,

and the authorities there cited, as well as to the rules of law in relation to the effect of destruction of testimony by a party to pending or expected litigation.

And we contend that justice and equity require that plaintiff in error, because of those wrongful acts, should stand, and be held *estopped* from denying that Brown was a credible, trustworthy and truthful witness as to the testimony by him given in his deposition, (at least that because of those wrongful acts and doings it was not entitled to have

said refused instruction No. 44 given to the jury, irrespective of any other reason for rejection thereof).

And from consideration of all the evidence, even of that produced by plaintiff in error, without resorting to any testimony given by any witness called by defendant in error, *much more with that*, it is evident and *prima facie* proven that the Walters letters and theory were introduced and interjected into the case by methods and means *equivalent* to the payment of the $500 and expenses to Buchan, referred to at r. 1262, 1247–8, 1288, to help make good the *threat* of plaintiff in error, made by *its agent* Buchan to defendant in error on the day it, by Buchan, obtained the release, *to the effect that she could never recover* on the policy *because* of the *millions* of the insurance companies (r. 771, and 500, A. 36), which threat we see was made in pursuance of the plan adopted to scare and bluff Brown into believing it was better for Brown to let Buchan prepare the written statement, which, being a lawyer, he could *so easily do*, than for Brown to risk application of the money power of plaintiff in error and its assistant insurance companies on proceedings in court, to convict him on a charge of murdering Hillmon (threat of use of money to change accidental to intentional killing), shown by the parts of the said deposition copied in the statement part of this brief, and by the testimony of Reuben Brown on the same subject, both corroborated by such of the testimony of Buchan as referred to his communications with Munn and others, and payment to him for what he did, promised, etc., as shown at r. 1262, etc., paid 1247–8, 1288.

And we submit it is not claiming too much to insist that whoever *would do* what plaintiff in error and its assistants *unquestionably did*, with and through the aid of Buchan, as shown by undisputed testimony, would consider it a *mere trifle* to attempt to establish the Walters theory, as a *substitute* for that of Burgess, *much needed by plaintiff in error* when Burgess failed to *remain* either *dead* or *among* the *missing;* and if possibly plaintiff in error should by its agents have seen the tramp Walters after development of the Walters theory, any one conversant with the situation after reading the history of said written statement and the Burgess fiasco, would

doubtless have wondered if Walters had not been given business opportunities sufficient to induce him to not assist in *protruding his continued existence* into the case by any *further* or subsequent voluntary act of his.

And because of all this, we submit the trial court *did not err*, as claimed in the 74th assignment of error, and that so far as that effusive letter to "Dearest Alvina," advising her to tell an untruth on occasion when we have seen she might as well have told the truth (even if a falsehood might ever be advisable, which we do not admit, but which, whoever wrote that letter, appears to have thought otherwise), is concerned—even if Walters wrote it—we submit it was proper for the trial court to *stop* when it had given to the jury the full force and effect thereof, *in conformity* with the referred to opinion of this Court, and from which it read when so doing.

WALTERS THEORY, ETC., CONTINUED.

ASSIGNMENTS OF ERROR.—Nos. 75, 76, 77 and 84 (r. 1987–8, 1995–6), relating to acts and doings of the Walters family after the death, and after the controversy arose, etc.

We refer to what we say herein in relation to assignments of error Nos. 74 and 105 as being applicable and proper to consider here, and to what we say about No. 74, as a reason why the Court did not err as claimed in assignments of error Nos. 75, 77 and 84.

And further, the witnesses, Mrs. Elizabeth Rieffenach and Fannie Walters, mentioned in those assignments of error Nos. 75, 76, 77 and 84, each testified to having seen and recognized the photographs of the corpse as a picture of their brother (r. 1778, 1798, 1799), at Fort Madison, Iowa, in January, 1880. The Court did not reject evidence of either of their recognition of the pictures—merely rejected evidence as to what their mother said or did in January, 1880, on the

occasion referred to in said assignment of error, at r. 1778, 1798, 1799, when she saw a certain picture of the corpse. This time, January, 1880, was long after controversy arose over the question of identity as to whose dead body, whether of Hillmon or some other person, arose, and also rejected evidence as to any tombstone or inscription mentioned in the 77th.

The transactions mentioned in this and the brief of plaintiff in error about inquests, releases, Brown's statement, etc., had all occurred. Of course the newspapers had, as part of the public history of this controversy, to entirely too much extent published some truthful and some erroneous accounts of the controversy. (R. 874.)

Theodore Wiseman, who had abandoned the theory that Nichols or Burgess had been a victim (r. 903, 906, 908), folfowed the Walters theory to Fort Madison, and sent pictures of the corpse to some one there about the middle of December, 1879. (R. 878, 879, 880, 881.)

Wiseman, in the matter of controversy and inquiry after missing men, went to Wichita and spent some weeks there in the spring and early summer of 1879, making inquiries, etc. (R. 887, 888.)

In the meantime, as a result of correspondence between persons in Fort Madison and Wichita, a picture of the corpse was received by Daniel Walters in January, 1880. (R. 1622, 1630, 1631.) Whether Mrs. Walters had or had not seen any of the three pictures of the corpse so sent to Fort Madison, or other pictures thereof before the time when she is claimed to have said and done as mentioned in said specification 12, is not shown by the evidence. But whether she had or not, we submit that it is evident that such controversy had arisen as would exclude testimony of what she so said and did in January, 1880, or as to whether a tombstone had been erected, or what inscription was thereon, or as to whether the insurance companies or the Walters family paid therefor.

1 Greenleaf on Ev., Sections 131 and 133.

The acts and remarks of the family of Walters after the death were mere hearsay and were not competent evidence,

this not being a case involving a question of pedigree, etc. See—

Conn. M. L. Ins. Co. (plaintiff in error) vs. Schwenk, 94 U. S. 593, 598–9.
Heyler vs. Faulkner, 153 U. S. 109–118.
M. B. L. Ins. Co. vs. Tisdale, 91 U. S. 238.

The parties to this litigation do not either of them claim under or through Walters or his family, and the fact that plaintiff in error tries to profit from a claimed misfortune of that family is no reason why what any of that family may have said or done should be given in evidence, or considered otherwise than as the acts and sayings of any member of any other family.

If what Mrs. Walters said or did in the presence or absence of the pictures is competent evidence, then anything that any person might have said about Hillmon or Walters after the 17th of March would be competent testimony. Witnesses could be produced without limit who could truthfully testify that they had seen third persons look at the pictures in question and say it was the picture of Hillmon, and *possibly* others that it was the picture of Walters, and others that it was the picture of neither, yet none of the testimony of such witnesses would be competent. In order to make the deeds and words of Mrs. Walters evidence, or anything in relation to the tombstone, you have got to obliterate the rules as to hearsay evidence, which applies to things done as well as things said. Relative to this rule Mr. Burr W. Jones, in his work on evidence, 2nd volume, pages 679, etc., Sec. 301, employed the following language:

"Hearsay may relate to what is done or written as well as to what is spoken. This proposition, as well as the strictness with which the courts adhere to the rule excluding hearsay, is well illustrated in a celebrated case, often cited, in which it was held that letters addressed to a deceased testator, indicating that the writers thought him sane, but which were not acted on by him, could not be admitted for the purpose of proving his sanity. By way of illustration,

Baron Parke stated, in his opinion in this case, that the conduct of the family or relatives of a testator in taking the same precautions in his absence as if he were a lunatic, his election in his absence to some high and responsible office, the conduct of a physician who permitted a will to be executed by a sick testator, the conduct of a deceased captain on a question of seaworthiness, who, after examining every part of a vessel, embarked in it with his family, would all be mere instances of hearsay evidence—mere acts or statements not on oath—but implied in or vouched by the actual conduct of persons by whose acts the litigant parties are not to be bound."

In support of this proposition, Mr. Jones cites the following cases:

Sussex Peerage Case, 11 Clark and F. 85, 113.
Stapylton vs. Clough, 22 Eng. L. & Eq. 276; 2 El. & B. 933.
Schooler vs. State, 57 Ind. 127.
Ashcraft vs. De Armond, 44 Iowa, 229.
Hunter vs. Randall, 69 Me. 183.
Filley vs. Angell, 102 Mass. 67.
People vs. Cox, 21 Hun 47.
State vs. Haynes, 71 N. C. 79.
Campbell vs. State, 8 Tex. App. 84; 1 Greenl. Ev., Sec. 99; Tayl. Ev., Sec. 570.
Wright vs. Doe, *ex. dem.* Tatham, 7 Adol. & Ell. 313.

And see also—

People vs. Williams, 3 Abb. (N. Y.) App. 596.

If in May, 1881, when the deposition of Daniel Walters was taken (r. 1619), the insurance companies had seen fit to take such evidence as Mrs. Walters, who lived until 1888 (r. 1779), could have given in reference to recognizing or not said pictures as her son, she could have been cross-examined in relation thereto and on the matter of when she had first seen any of those different pictures, sent to Fort Madison, or talked of the matter in controversy with others.

And as to the identifying evidence by means of the pictures of the much decayed and shrunken corpse, because of

an *expression, general features*, etc., shown thereby that plaintiff in error may claim or refer to as the means of identification of the dead body as being that of Walters, we submit that a comparison of the pictures of the corpse with the pictures of the living Walters and Hillmon will show that the corpse was like Hillmon and not Walters, so far as pictures of a twenty-day-old corpse could be expected to, and that there is not any such likeness (none at all really) of either *expression* or *general features* of the corpse with the pictures of the living Walters as to call for the overruling of the authorities in relation to incompetent and hearsay evidence.

ASSIGNMENT OF ERROR No. 78. (R. 1988–9.)

Relating to Excluded Opinion of Wiseman.

We submit the Theodore Wiseman therein referred to was not shown to be such an expert as would have made an answer of his to the objected to question competent, even if the matter of that question was the subject of expert testimony—but we submit it was not, and that it was not competent or proper to ask such a question.

ASSIGNMENT OF ERROR No. 79. (R. 1989–90.)

Relating to Excluded Memoranda of Dr. Miller.

We submit that the rejected memorandum therein referred to was mere hearsay and not competent, and in support of this objection we refer to what we have said and to the authorities we have cited in relation to the matter of the 75th, 76th, 77th and 84th assignments of error.

And further, the Dr. V. G. Miller referred to was the same person who, as medical examiner for the Mutual Life Insurance Company of New York (the case against which was being tried at the same time as that against plaintiff in error), and in whose certificate as such he stated that Hillmon was 5 feet 11 inches high (r. 192–3), and *that* whilst Hillmon was alive and with him, but when Hillmon was dead he turns up

with the rejected hearsay memorandum—we submit it was not competent for that company or its agent (Miller) to make evidence by any such memorandum; there cannot be any presumption that he had performed his duty. If he did not know that Hillmon was 5 feet 11 inches high by actual measurement when he signed that certificate, set forth at r. 923, he was guilty of the most gross misconduct, not only towards his principal, but also towards Hillmon. The matter of the height of Hillmon was of importance as a matter of identification and description of the person, and he stated, as shown at r. 193, that he had made in private a physical examination of the person proposed for insurance, and made such further statement in that certificate as puts him in the position of a falsifier of facts when considered in connection with the rejected memorandum; the two statements put together show he was not a truthful man, for they differ as to the matter of the height of Hillmon. Of course, the medical examiners' certificates were competent evidence, and we submit his hearsay statement was not only not competent, but tended to show Miller to be utterly unworthy of credit in the matter of statement of his. There is no pretense Hillmon was present when Miller made that memorandum, or that Hillmon ever saw it. An examination of the several applications and medical examiners' certificates show that Hillmon was accepted by the companies as a man 5 feet 11 inches high (see r. 178, 184, 187, 192, 195, 198), and we submit the insurance companies ought to have been held estopped from any attempt to show that he was of any different height; but such rule of estoppel was not asked for by defendant in error or applied by the Court, but on the contrary, Miller and Stuart respectively testified to their content that they had made false certificates, and that their statements were not reliable; but we submit that the rule ought not to be extended to permit the insurance companies to show that Miller made such memorandum—his testimony to the effect that he had made a false certificate when Hillmon and he were together was admitted, and we submit that was going far enough in that direction.

ASSIGNMENT OF ERROR No. 80. (R. 1990–1, 1481.)

Relating to Opinion of Griffith.

The answer of the witness, Griffith, was stricken out because it was not responsive to the question asked him; he was not asked how defendant in error appeared, nor what she appeared to know, the question was as to what she did know, that is, as to whether she knew the color of her deceased husband's hair or not; the question did not ask Griffith as to whether she *appeared* to know, but called for the matter of her knowledge, and of course it was proper to strike out such answer, and if the witness did not know what the defendant knew, he *should* have contented himself with saying he did not know, but instead of that, he stated the conclusions he arrived at in his own mind on that subject, which of course was not *either competent* or responsive to the question asked him; and in this connection it should be borne in mind that this is the same Griffith, an agent of one of the insurance companies, to whom Wiseman, another agent thereof, on the way back from Medicine Lodge where the dead body had been exhumed to be transported to Lawrence, and while at Hutchinson on his way back to Lawrence wired to Griffith (r. 901–2), directing Griffith to see the defendant in error immediately and get from her a description of her husband (r. 1492), in pursuance of which telegram Griffith, on the 1st of April before the arrival of the dead body at Lawrence, requested her to call at his office (r. 1482–3) and make out an application, meaning evidently to help her prepare papers preliminary to make application for life insurance policies (r. 1503–4, 1482 to 1489, 1885–6–7, 1891–2–3). And he, (Griffith) having procured the attendance at his office of Selig, an agent of plaintiff in error (r. 1496, 1503–4), Griffith, with the assistance of Selig, proceeded to interrogate, make assertions to, and nag defendant in error evidently with the hope of getting a false and incorrect description of her deceased husband to be signed by her, as shown at r. 1482 to 1489, 1503–4, 1885–6–7, 1891–2–3, and having failed, as shown by the record at the pages cited, Griffith sought by so expressing

his opinion in answer to the last before mentioned question to *partly make up for his failure* to entrap defendant in error into making an incorrect description of her husband. If he had not failed, but had got her to sign any incorrect statement, it is of course clear beyond question it would have been produced at the trial, and we submit that it was incompetent for him or plaintiff in error to make up for their chagrin, because of such failure to so entrap her, by his giving to the jury the conclusions he pretended to arrive at in his own mind, as indicated by the stricken out answer, we submit that there was nothing in the evidence or the nature of the question excusing or sustaining the claim of plaintiff in error that Griffith was such an expert on the appearance of people as to make competent any opinion he may have formed as to her appearance or what it indicated.

ASSIGNMENT OF ERROR No. 81. (R. 1991, 1481–2).

Relating to Question not Ruled On.

One of the first principal and quite sufficient answers to that 81st assignment of error, is, that the Court did not rule or make any decision on or as to the question in that assignment of error mentioned, but on the contrary the insurance companies, including plaintiff in error, voluntarily withdrew that question (r. 1482), which of course disposes of that assignment of error.

ASSIGNMENT OF ERROR No. 82. (R. 1991–2, 1544.)

Relating to C. W. Smith, Etc.

For a sufficient answer to that 82d assignment of error we request attention to the fact that the Court did not in any manner rule on the question therein mentioned (r. 1544), nor have reasonable opportunity so to do because, when the objection was made to that question, there was nothing to indicate that Baldwin had any knowledge as to what was being

done in the matter of cutting pieces from or cutting up the dead body to any extent it was cut up until after it was done. Mr. Isham, one of the counsel for the insurance companies, taking offense, made several remarks, shown at r. 1544, and thereupon the Court directed the jury to pay no attention to certain outside comments of counsel, whereupon counsel for plaintiff in error, without waiting for or giving opportunity to the Court to rule upon the objection to that question, proceeded to further examine the witness, and thus abandoned that question. Of course, under such situation, there is no question here for consideration with reference to the matter of that question; but, if the matter of that question is open for consideration here, then we submit that question was entirely incompetent for many reasons, among others because it did not matter, and was entirely irrelevant and immaterial to the case, and incompetent to prove whether Levi Baldwin, or John Smith, or any other person on earth, other than defendant in error, made such objection as referred to in that question or not. When in the morning of the day the dead body arrived at Lawrence it was taken to the undertaking establishment of Bailey & Smith, undertakers at Lawrence (r. 1527, 690, 525, etc.), although defendant in error expected it to be brought to the place where she resided, and endeavored to have it taken there (r. 756–7–8, 765, 525) (which was the 3d of April), and on the morning of that day of the arrival of the corpse at Lawrence, doctors, including Dr. Stuart, medical examiner for plaintiff in error, took charge of it all the time until they finally let him (Smith) have it for the purpose of burial (r. 1540), which burial was on the 5th of April (r. 1542), and in the morning on which the body so arrived at Lawrence (the 3d of April), those doctors, physicians, in the morning of that day, cut up the body to some extent, and cut out part of the arm where a vaccine sore was, and had a post mortem examination of the body on that day, as shown at r. 1540–1–2 and elsewhere, and it was during the time of such post mortem examination and cutting out of that piece from the arm, that defendant in error with her mother and others, went to that undertaking establishment of Bailey &

Smith to see the body, but were refused and prevented from seeing it on excuse to the effect that it was not then in condition to see (r. 758, 796, 534. 335, 1542), and which matter of cutting out a piece of the arm of the corpse was followed by Drs. Stuart and Miller applying a hot iron to the piece of flesh so removed for the pretended purpose of preserving as evidence, etc., as by them stated at r. 969, 970–1, 988, to see the effect thereof, etc., which cutting and application of hot iron of course destroyed any further use of such piece of flesh for any such purpose—which piece of flesh, although Stuart pretended to remove the same to preserve it (r. 922–3), was followed by the fact that he, early in 1882, before the first trial of the case practically, purposely thew it away and it became lost (r. 923, 984, 987, 988); and after the dead body was buried on the 5th of April, 1879, as shown at r. 1542, 1888, and elsewhere, it was again exhumed on the 6th of April (r. 1542), at the instance of the representatives of the insurance companies, as shown at r. 766, 241, 929, 1542, and elsewhere, and at the instance of those companies, then when the body was twenty days old, and the hair badly mussed by handling and turning and bringing into position the corpse to take photographs of (r. 225–6), and Dr. Stuart had pulled out some of the hair from the head and the hair had become badly disarranged and full of dust, earth, clay, at the cemetery, and the face to some extent covered with dirt, and the eyes very much sunken, and rapid decomposition had taken place to such an extent that one would not have recognized the corpse with the dead body at the inquest had it not been for the teeth (r. 241–2)—the photographs through and by means of which the plaintiff in error seeks to establish their so-called Walters theory, were taken both of front and side view, as shown by the supposed copies thereof in court here—for all which we submit it was not competent, relevant or material whether Baldwin objected or not to what they had been doing.

ASSIGNMENT OF ERROR No. 83.

(R. 1992 to 1995, 1589 to 1592.)

Relating to Excluded Hearsay.

When the certified copy in that 83rd assignment of error mentioned was offered in evidence, the defendant in error, as shown at r. 1589, objected that any statement therein of description of John W. Hillmon was hearsay, and that it was not made by him, nor by his direction, nor with his knowledge, so far as it appears, objected to it as incompetent, irrelevant and immaterial and hearsay, and thereupon (as shown at r. 1589, 1590), the Court in substance inquired of counsel for plaintiff in error and the Mutual Life Insurance Company if the certificate of the recruiting officer was the part of the certified copy they claimed was material, to which counsel answered "Yes sir" (r. 1590), and thereupon the Court sustained the objection (r. 1590), and we submit that the offered copy was mere hearsay, and was not competent, material or relevant, and in support of our claim in that respect we refer to the cases decided by this Court, and to the authorities hereinbefore cited in relation to the matter of the 75th, 76th, 77th and 84th assignments of error, and that therefore the ruling of the Court was correct.

ASSIGNMENT OF ERROR No. 85. (R. 1996, 1904.)

Relating to the Matter of the Real Question to be Determined Being Whether the Dead Body was that of Hillmon or Not, also Relating to the Disputed Teeth Question.

We contend that for reasons shown *ante* plaintiff in error has not any available exception to the refusal of the Court to give instruction No. 1, mentioned in that assignment of error, and further, there was not any exception taken to that part of the charge of the Court which related to teeth, or to that matter of the identification of the body (r. 1924).

By asking the refused instruction No. 1, mentioned in

that 85th assignment of error, plaintiff in error conceded that the question remaining to be determined in the case after the evidence closed, was as to whether the dead body brought to Lawrence in April, 1879, was the body of John W. Hillmon or not, and asked the Court to instruct accordingly, which it did, as shown at r. 1917–18, 1919, 1921, in its general charge to the jury, and there was not any exception taken to that part of the charge, and of course plaintiff in error cannot be heard to complain of the Court adopting a theory of the case as requested by it.

But plaintiff in error, by asking that refused instruction, also asked the Court to select one of the many points, marks and reasons for identification and recognition, and make the case turn on that, contrary to the rule of law shown by the case of—

Grand Trunk Railway Co. vs. Ives, 144 U. S. 433;
Smith vs. Condry, 1 Howard, 28, 36;

whilst by reference to preceding parts of this brief, including that part in which we refer to evidence in relation to the identification of the corpse, it will be seen that there were many points of identification, each equally prominent as that in relation to teeth, and concerning which there was not any conflict of evidence, whilst as to the teeth matter there was a great conflict of evidence, yet plaintiff in error sought to make the case turn on the tooth question involved in the case as though it were the only matter of identity, thus asking the Court to require the jury to ignore all other evidence of identity. We submit it would not have been proper for the Court to have so done. We have in the statement contained in this brief referred to some of the evidence of identification, showing the dead body was the corpse of Hillmon (and, also, not the body of Walters), which we here refer to, but further, that refused instruction was, in its statement of facts, incorrect. The words, "Proof has been offered, which has not been disputed, that the corpse had a perfect set of teeth, without decay or imperfections," found in said assignment of error, were untrue; among other evidence Dr. Patterson, who, for the insurance companies, made the model mentioned

at r. 236, etc., testified to the effect that there was irregularity in the lower front teeth, and that the lateral incisor on left side of upper jaw was shorter than its mate; that it gave evidence of having been worn by a pipe or something of that nature considerably at that point—more than any other point on the front teeth, and showed how an opening would appear at that point as though a tooth was absent. (R. 237, 235 to 238.)

That Hillmon had good teeth, see r. 748, 525, 531, 532, 539, 720, 507. The defect spoken of by Patterson would not necessarily be noticed by all persons seeing him, whilst the conflict between the different witnesses who testified at the instance of plaintiff in error in relation to the teeth of Hillmon is, we submit, sufficient to destroy all their testimony and rebut their whole evidence among themselves, whilst the shortness of the one tooth so described by Dr. Patterson accounts for what some of the witnesses of plaintiff in error said about a tooth. See—

Henry Hillmon, r. 1094.
Theodore Wiseman, r. 860, 861, 882 to 901.
Claude Holliday, r. 994, 997.
Tinetta Corcadell, r. 1038; lower corner seemed worn off.

Whilst the testimony of William Hillmon (1097, 1107 to 1110), and Mrs. Nichols (1121, 1122, 1123), and others is in conflict, not capable of being reconciled with that of the other above named witnesses of plaintiff in error, or with several others of its witnesses in relation to the matter of Hillmon's teeth. This conflicting evidence of plaintiff in error was so destructive of itself as a whole as to render it proper for the jury to conclude that the conflict on the tooth question presented was well explained by Dr. Patterson, as shown at r. 237, where it is shown that he testified to the effect that one of the teeth in the mouth of the corpse, the left lateral incisor in the upper jaw, had been by a pipe stem or something of that order, worn considerably, so that when the lips were drawn around the upper teeth the major part of that tooth would not appear while the others would; and he explained that matter to the jury. Which explanation would

tally with other evidence in the case, shown at r. 748, 525, 531, 532, 539, 720, 507.

We also refer to the fact that neither Selig, agent of plaintiff in error, or said examining M. Ds., Stuart or Miller, testified to any of the teeth of Hillmon being decayed or missing. We submit the question of credibility of the witnesses, and the matter of preponderance of the evidence, etc., was properly left and submitted to the jury. (R. 1918, 1919.) There are many men named Hillmon. Howe (r. 1378) did not know whether he worked on John W. or some other Hillmon's teeth.

In this connection we refer to the testimony of Isaac Johnson, a witness called by plaintiff in error and the Mutual Life Insurance Co. (r. 1206), having testified to the effect as shown at r. 1209, 1210, that he knew a Hillmon who lived over or next to a store kept by one Hart on Massachusetts Street, between Pinkney and Winthrop, in Lawrence, Kansas, in 1878–9, and to the testimony of defendant in error at r. 1887–8 to the effect that there was another Hillmon Johnson may have meant, and that she and her husband did not ever live on Massachusetts Street, and to the fact shown by the common knowledge of which the Court takes notice, that there are many Hillmons, and that doubtless too many of them as well as too many of the people of any other name have a good many bad teeth, and that doubtless many of them would have liked to have had the dentist (Howe) work on their teeth if they resided near enough to him; and we submit that the identification of a person merely by that of his last name does not amount to anything worthy of consideration when it comes in conflict with any affirmative evidence, and but little at all.

The demeanor, conduct and appearance of the witnesses upon the stand was proper matter for the jury to consider.

And further, as part hereof, we refer to the foregoing part of this brief in relation to matters of identification.

Evidence identifying corpse as that of Hillmon, etc.: Vaccine sores; hair; identification of corpse as Hillmon; nose of both Hillmon and Walters; eye brows; dog bite; Walters'

crooked little finger—none on corpse; Walters' bunion; Walters' corns; Hillmon's ring mark; hands—driving marks; teeth; Hillmon's dark brown hair; Hillmon's height, length of corpse, etc.; scars; mole; photos of corpse; Hillmon and Walters compared; Walters seen alive after April, 1879. And where there were so many points of identification it would have been improper and misleading for the Court to point out a single one.

The testimony of some of the witnesses of plaintiff in error (as set forth at pages 1097, 1107, 1110, 1121, 1122, 1123) indicated he had a very bad mouth, whilst others left it in fairly good trim, differing among themselves, and showing that as a class of tooth witnesses, by their contradictory description of his teeth, that they could not be relied on to determine any question of fact. We submit there were many reasons for rejecting that instruction, and that the Court did not err in so doing.

And further, in this connection we refer to r. 87 and 1924, from which it appears that the trial court, at the request of plaintiff in error, in its general charge adopted and gave the substance of the 19th instruction, set forth at r. 87, which irreconcilably conflicts with the refused part of said instruction No. 1, set forth in said 85th assignment of error, and the Court having thus at the request of plaintiff in error, charged the jury in conflict with the refused part of said instruction No. 1. It follows that plaintiff in error cannot be here now heard to complain of the refusal of the Court to give the refused part of said No. 1, and if plaintiff in error shall claim that said No. 19 is not a part of the record in this case, then it follows that it, plaintiff in error, cannot be heard on or as to the matter of said 85th assignment of error, or any other, in relation to the matter of the trial court having refused to give any instruction it requested because unless so much of r. 84 to 94 as relates to instructions is part of the record, there is nothing to show plaintiff in error, either by itself or attorneys, signed any instruction by it requested or any request that the trial court give the same, and unless

such request was so signed plaintiff in error cannot assign error or be heard in relation to the matter thereof.

Morisette vs. Howard, 62 Kansas, 463, 468, and Sec. 914, R. S. of Congress, 1878.

ASSIGNMENT OF ERROR No. 86. (R. 1996.)

Relating to Refusal of Court to Strike Out Certain Testimony Introduced by Plaintiff in Error.

We contend that for reasons hereinbefore stated, plaintiff in error cannot be heard in relation to the matter of the refusal of the Court to give the instruction No. 31 in that assignment of error mentioned for want of available exception thereto, some of the refused instructions being properly refused, the exception actually taken being to all as a unit, as shown at r. 1926.

There was not any evidence that Hillmon made any such statements as mentioned in that assignment of error other than as testified to on examination in chief of witnesses called by plaintiff in error and the Mutual Life Insurance Co. in answer to questions asked by their counsel, to, in and about the matter of their attempt to show Hillmon was not as tall, to-wit: 5 feet 11 inches, as stated in the medical examiner's certificate attached to Hillmon's applications for insurance, as shown at r. 178, 184, 187, 192, 195, 198, and also at r. 138, which several certificates show it was the duty of those medical examiners to have ascertained the actual height of Hillmon, and properly insert the same therein according to the actual truth, and of course it was important that such statement should be correct.

But as when the aforesaid dead body was at Lawrence being examined after death of Hillmon by said examiners, it was found that the corpse was of a length to correspond with such 5 feet 11 inches—a corpse of a man when lying down is usually a little longer than the standing living man (as is known by common knowledge)—therefore to help show the dead body was not the corpse of Hillmon (as the repre-

sentatives of the insurance companies as we have seen, bestirred themselves to do from the time Wiseman telegraphed Griffith as hereinbefore mentioned) an effort has been made among other things to prove Hillmon was not 5 feet 11 inches high, and of course it could not be by them hoped successfully so to do, unless so much of those certificates of the agents of the insurance companies, said medical examiners (whose duties as agents and representatives of the insurance companies it was to so correctly in such certificates state the height of Hillmon, as between the insurance company and the insured), as stated Hillmon was 5 feet 11 inches high, could be shown to be false, therefore those medical examiners after the death of Hillmon respectively testified to the effect that they so inserted that height because Hillmon told them such was his height—now sometime *they published an untruth*, either when they so stated in said certificates or when they testified he was not so high as they respectively did, and in doing so, further testified that Hillmon also told them he was not that high, we have in the statement part of this brief referred to the matter of the height of Hillmon, and if this Court shall think that the matter of that refused instruction ought to be investigated to see whether the Court erred in refusing to give refused instruction No. 86, then to do so intelligently it will be necessary for the Court to read all of the evidence referred to in the statement in relation to the matter of the height of Hillmon, and also the parts of the record referred to herein in relation to assignment of error No. 79; but we submit that considering that Hillmon is in said certificates stated to be 5 feet 11 inches high, and as the matter of his height was to be arrived at by some means, that if the insurance company by their agents saw fit to take statements of Hillmon as to his height and stated accordingly in their appropriate certificates, plaintiff in error was not entitled to the refused instruction, because if his statements were sufficient for them so to act and certify on, surely they were not entitled to that refused instruction; and further, the real object of asking that instruction was apparently to mislead the jury into supposing the Court meant thereby to convey the idea to them

that the fact that the plaintiff in error had by its agent, Dr. Stuart its medical examiner, in certificates by him made for it and as its agent certified Hillmon was 5 feet 11 inches high, still that such certificates were not evidence to be considered on the question whether such was his height, and of course such would have been the practical effect of such instruction if given.

And further, it was not proper for the Court to state to the jury either that as a fact Hillmon so stated, or if he did that such statement was not evidence of his height, he could not have so stated without being before the agents, and if they chose to accept and approve of any such statement of Hillmon, it was competent to be considered by the jury.

ASSIGNMENT OF ERROR No. 93. (R. 2000.)

Relating to a Refused Instruction.

We contend that for reasons hereinbefore stated plaintiff in error cannot be heard in relation to the matter of the refusal of the Court to give the instruction No. 11, in that assignment of error mentioned, for want of available exception thereto, some of the refused instructions being properly refused, the exception actually taken being to all as a unit, as shown at r. 1926.

And further, we submit that said instruction No. 11 was erroneous and misleading in many respects and not proper matter of instruction, and was properly refused.

And further, we contend that said instruction was not applicable to the testimony of any witness in the case, because there was not, if we remember right, a witness who identified the body, that is, who saw the body and identified it as that of F. A. Walters. To pretend to recognize the photos of a twenty-day corpse as being that of a man a witness had known in life, is, we contend, not identifying the body as that of such person; and further, it was within the province of the jury only to determine what the testimony

of the witnesses who pretended to recognize photos of the corpse as being that of Walters amounted to within the meaning of that instruction.

ASSIGNMENTS OF ERROR Nos. 94, 95 and 1st 96.

(R. 2000–1.)

Relating to Refused Instructions.

We contend that for reasons hereinbefore stated plaintiff in error has not any available exception to the refusal of the Court to give either of the instructions Nos. 12, 13 or 14 in either of those assignments of error mentioned. And further, to have drawn the attention of the jury to, and so instructed them on the matter of those instructions, and thus to ignore the evidence in the case by which the circumstances under which the releases and order for policies were made would have been erroneous, and if the Court had given either thereof it would have in substance, as matter of law, struck out a large amount of evidence applicable to the matter of those instructions which it was proper for the jury to consider—and it was not proper to thus single out, as shown by those instructions respectively, the matter thereof in the manner requested thereby.

And further, we submit those instructions were properly refused because of what we hereinbefore say in relation to assignments of error Nos. 27, 28, 29, 30, 31, 32, 59 and 105, and of what the Court charged the jury in its instructions to them in relation to the same matter, as shown at r. 1917, 1921–2.

ASSIGNMENT OF ERROR No. 96 (2nd of that Number.)

(R. 2001.)

Relating to a Refused Instruction

We contend that for reasons hereinbefore stated, plaintiff in error cannot be heard in relation to the matter of the refusal of the Court to give the instruction No. 18 in that assign-

ment of error mentioned for want of available exception thereto, some of the refused instructions being properly refused, the exception actually taken being to all as a unit, as shown at r. 1926.

And further, we submit that considering all of the evidence in the case in relation to the question of the identity of the dead body, and also considering testimony of Charles W. Schott, shown at r. 1666, 1670 to 1673, and to that of Arthur Simmons (r. 1856, 1858, 1860), to the effect that Walters was alive and seen in Kansas City and Leavenworth in the spring of 1879, after the matter of the death of Hillmon and as late as in May, 1879, two months after the death on Crooked Creek, and the testimony of Fannie Walters that F. A. Walters wrote her from Leavenworth (r. 1795, 1808), and also considering the other matters urged hereinbefore in relation to the matter of assignments of error Nos. 75, 76, 77 and 84.

And also considering the matters we have hereinbefore urged in relation to assignment of error No. 105, and to the charge of the Court on those subjects, we contend that if the Court had given the refused instruction No. 18, it would have greatly erred and would among other things have invaded the province of and misled the jury; and further we submit it was not proper to thus single out the matters mentioned in that instruction No. 18, and so charge with reference thereto in the manner as requested.

And further, we contend that it would not have been proper for the Court as matter of law to have charged the jury as requested by that instruction No. 18, and thus to have told the jury that the aforesaid written statement was a confession of John H. Brown that could be considered as such as matter of law as against defendant in error, she did not claim under or through him in any manner, and that paper was made long after anything said by John H. Brown could, because of being by him said, be introduced in evidence against her, or used in evidence against her, as requested by that instruction.

CLAIM OF FLIGHT WHICH NEVER OCCURRED.

ASSIGNMENT OF ERROR No. 97. (R. 2002.)

Relating to a Refused Instruction.

We contend that for reasons hereinbefore stated, plaintiff in error cannot be heard in relation to the matter of the refusal of the Court to give the instruction No. 22, in that assignment of error mentioned, for want of available exception thereto, some of the refused instructions being properly refused, the exception actually taken, being to all as a unit, as shown at r. 1926.

And further, we submit that considering all of the evidence in the case, it would have been improper and erroneous for the Court to have picked out the matter in that instruction mentioned, as one on which the case should be determined, without reference to the other evidence on the question of identity heretofore referred to in this brief.

> Grand Trunk Railway Co. vs. Ives, 144 U. S. 408, 433.
> Smith vs. Condry, 1 Howard, 28, 36.

By that instruction No. 22 plaintiff in error sought to have the Court, as matter of law, determine for the jury, as a fact, that Brown fled from the State of Kansas, whilst the evidence we submit was not sufficient to have even sustained any finding to the effect that Brown ever fled at all from any place to any place, but that on the contrary the evidence fully and definitely shows that Brown was always ready to put in his appearance at any time or place, when or where he had notice that any one wished to see him. More, the evidence showed fully that the insurance companies, by their various representatives, did their best to bluff and scare Brown to flee, but that they in that respect utterly failed; and we submit any claim or statement that may be made in any brief, or otherwise, in behalf of plaintiff in error, to the effect that Brown ever fled at all, is utterly and entirely unfounded, inexcusable and contrary to the evidence, and made

only to endeavor, by the weight of counsel and the hope of plaintiff in error to create prejudice against Brown, and to in so far as so doing might, trying to cover up the enormity of the offense committed by plaintiff in error in obtaining from Brown the written statement mentioned in assignment of error No. 105, under the circumstances, in the manner, and by the methods used to obtain the same. With reference in this connection to the subject matter of that refused instruction, we will refer to certain parts of the evidence, including the aforesaid deposition of John H. Brown, and the testimony of William Riggins, George W. Paddock, S. A. Ferguson, Charles Chadwick, Jacob Frazier, Harvey M. Davis, Clark Gilmore, E. M. Byerly, Eli Smith, Derrick Updegraff, W. W. Standiford, F. P. McAllister, A. J. Phillips, set forth in the record, as shown in the index thereto, that when John H. Brown, on the 17th of March, 1879, accidentally killed Hillmon, he immediately caused people residing in the neighborhood to assemble at the place where Hillmon's dead body lay, where an inquest was held, and remained there with them until some of them went with him and the dead body to Medicine Lodge, where a second inquest was held, and that after the burial he went with Paddock and remained with him several days, until Brown returned from the residence of Paddock (Paddock was J. P., who presided as coroner at the Barbour County inquests in place of the absent coroner) to Medicine Lodge, and from there returned to Lawrence with the dead body, as before shown; and that Brown, after having testified, as before shown, at the Lawrence inquest, and remained there until Mr. Barker, one of the employed attorneys of insurance companies, told him he was through with him (r. 431, 429, 434), and which, in substance, giving of leave to Brown to depart and go about his own private affairs, Barker did not deny, although he, at instance of plaintiff in error, testified as a witness, as shown at r. 1735, in relation to matters occurring concerning the Lawrence inquest, and then Brown went to his home, that is, his father's place, near Wyandotte, and from there to his brother's, near Parkville, Mo., and from there to different places, until he met Buchan at Lexington, as before shown; and Buchan

there learning that Brown thought of endeavoring to go back and work for his brother, Reuben Brown, in Platte County, Mo., near Kansas City, gave him some money, and tried to persuade Brown not to return to his brother's place but to go further away (r. 474, 550); and that whilst Brown was at Lawrence, attending the inquest there, Theodore Wiseman, one of the above mentioned agents of the insurance companies, tried to get A. J. Phillips, an acting officer there, to scare Brown into leaving (fleeing, as plaintiff in error likes to call it on Brown), but failed, as shown at r. 1851 to 1854, and at various times, as shown at r. 1066, 1070, 1071, 457, 458, 474, 477, 547, 549, 552, 553, 557, 559, 562, 563, 564, 565, 569, 570, 573, 574, 1281, and elsewhere, but still it is seen he was easy enough to find at any time Buchan, or any other person, sought to find him, and let him know they wanted him. He was a young man, and of course had to make his living. By reading the deposition of Brown, and looking at the map of the country, it will be seen that during the time which elapsed between the time when Brown so, with the assent of Barker, left Lawrence, until the releases were obtained from defendant in error, Brown was in one of the best populated, best cultivated, most thickly settled portions of this whole country, comparatively speaking, close to Kansas City all of the time; and notwithstanding all efforts made by plaintiff in error and the other insurance companies interested, through their various agents, to try to get Brown to run away—*flee*—or something of that sort, he was always, and has always been on hand, or where he could be easily found; now and for many years last past, as shown at r. 545, Brown has been resident at Jasper, Arkansas. There is not a scintilla of evidence in the case indicating that any person ever sought to find Brown, and failed so to do, unless excepting with reference to when there is enough in the evidence to show they did not use ordinary means to inform him they wanted to see him at a certain time or place. The failure of Buchan and Walker to find him is sufficiently explained at r. 438, A. 1076. When Barker, Green and Munn, representatives of the insurance companies, as shown by the before cited testimony of Buchan, ascertained that Brown, in addi-

tion to having before testified at the inquests that the dead body was that of Hillmon, had also made proofs of the death of Hillmon, they employed Buchan to obtain the written statement, as before shown, and as shown by the testimony of Buchan, one of the representatives and witness of the insurance companies; then when they employed him to obtain that statement, he took pen, ink and paper, and the bogus officer, and fast team of the sheriff before referred to, because he (Buchan), and evidently Barker, Green and Munn, knew where he was to go to find Brown, and there found him at work on the farm of his brother Reuben, within a few miles of Parkville, in one of the flower spots and among the best settled of the farming sections of the country—and then Buchan, as before shown, got the statement.

There is not any conflict of evidence as to the whereabouts of Brown, and not a particle, not a scintilla, of evidence showing that he was anywhere or did anything other or otherwise than as shown by his own deposition—except as Buchan, the attorney, who, by his own testimony, shows that for money, a few hundred dollars, he dumped his trusting client into the mire, and Buchan conflicts with Brown so far, and as to the point as to whether Brown and defendant in error were hunting him (Buchan) for a chance to make the statement, and defendant in error to give up the policies, which, we submit, in view of all the evidence, is absurd, that is, that the testimony of Buchan, in so far as it conflicts with that of Brown and defendant in error in relation to whether Brown wanted to make the statement, or defendant in error to give up the policies, is, we submit, absurd, not worthy of a moment's consideration, considering all the circumstances of the case, but whether so or not is perhaps immaterial on this question of charge of fleeing made in that refused instruction. If your honors shall ever think that possibly Brown fled, or thought of fleeing, from anywhere, we ask you to require plaintiff in error to point out the evidence which indicates it, or which gives it (plaintiff in error) any excuse for claiming that Brown ever fled. It is easy to charge with high-sounding language, and a bold front sometimes carries a man over a bottomless chasm, such as exists

between the charge of fleeing as to Brown, and proof that he ever did so, or even thought of doing so, or could, with all the ingenuity and efforts shown by the evidence on the part of the insurance companies' representatives, be induced or bluffed into so doing—that is, to flee.

As to payment of any money by defendant in error to Brown, surely it was no crime for her to owe him some for services he had rendered her husband, or to pay him therefor, as shown at r. 811 and 816.

ASSIGNMENT OF ERROR No. 98. (R. 2002–3.)

Relating to a Refused Instruction.

We contend that for reasons hereinbefore mentioned, plaintiff in error has not any available exception to the refusal of the Court to give the instruction No. 25 therein mentioned.

And further, we refer to what we have hereinbefore said in relation to the "Munn paper," copied at r. 580, including what we have before said in relation to assignments of error Nos. 27 to 32, 59 and 105, particularly Nos. 31 and 59, and to what we have said in the statement part of this brief in relation to that "Munn paper" as though here repeated in connection with the matter of that instruction No. 25.

And further, considering that plaintiff in error, by its agent, Munn (r. 1254), made that paper for the purposes shown at r. 580, 581, 592, for the purpose among others of procuring the release (r. 19), and further, considering that the only thing that saved the representatives of plaintiff in error from coming very near, if not quite attempting, to compound a felony is the fact that the aforesaid dead body was that of Hillmon.

We submit that plaintiff in error was not entitled to that instruction No. 25, and further, if given, it would have in many respects misled the jury, and caused them to think that in the opinion of the Court it was all right for the parties to do what they did in the way of getting from defendant in error the release, including all the transactions in relation to

that "Munn paper," and we contend it was not proper to single out that matter and instruct the jury as so requested; and in this connection we also refer to what we say herein in relation to the 102nd assignment of error, and submit that it was not proper for the Court to whitewash plaintiff in error and its representatives as requested by that instruction, and that the matter thereof should not have been singled out for the purposes shown by asking that instruction. By asking that instruction plaintiff in error is in the position of one who has attempted to commit a great wrong, but fearing it will fail asks the Court to give them a clean reputation because they feel they need such help. And further, if the Court had given that instruction No. 25, it would have greatly distracted the attention of the jury from the real points in controversy in the case, for all which and other apparent reasons we submit it was properly refused.

ASSIGNMENT OF ERROR No. 99. (R. 2003.)

Relating to a Refused Instruction.

We contend that for reasons hereinbefore stated plaintiff in error has not any available exception to the refusal of the Court to give so much of instruction No. 28, in that assignment of error mentioned, as it did not embody in its charge and given to the jury as hereinbefore shown.

As before shown the Court did embody in its charge and give to the jury all of said instruction No. 28, except part thereof which is to the effect that "the lapse of time since the alleged death of John W. Hillmon is an immaterial matter in this case," and no exception of any kind was taken to the general charge of the Court on this subject.

The refused instruction No. 28 was refused at a trial in 1899, twenty years after any evidence of Hillmon having been seen or heard of. His continued absence for twenty years was, we submit, proper matter for the consideration of the jury. Plaintiff in error did not except to the Court instructing the jury as shown (r. 1920), about absence.

That the Court would have erred if it had given that part of that instruction, which as quoted relates to lapse of time, and that the instruction or charge on the subject given, as shown at r. 1920, was correct is shown by the cases of—

Davie vs. Briggs, 97 U. S. 628, 634 to 636.
Whitely vs. E. L. S., 39 N. W. 369, and cases therein cited; and
1st Greenleaf on Ev., Sec. 41 and notes.

Yet, as that part of the charge which relates to absence was not excepted to, it is not material to consider whether the Court should or should not have so charged, the Court in saying what it did had reference only to the identity of that dead body.

2d. And the Court quite distinctly instructed the jury to the effect that the crucial question in the cases was whether John W. Hillmon died in March, 1879, and whether it was his body that was brought to Lawrence in April of that year. If it was not, to find for defendants, the insurance companies. (R. 1917–1918 and 1921.) And the substance of that 28th instruction was given, except that the Court did not say that the lapse of time was immaterial matter; and we submit the lapse of time was not entirely immaterial, but might be considered.

ASSIGNMENT OF ERROR No. 100. (R. 2003–4 and 151.)

Relating to Marriage of Defendant in Error.

We contend that for reasons hereinbefore mentioned plaintiff in error has not any available exception to the refusal of the Court to give instruction No. 33.

The policy sued on was payable to defendant in error under her name of Sallie E. Hillmon, as wife of John W. Hillmon, if she survived him (r. 6), and in that name she sued, but having after the commencement of the action married James C. Smith, as shown by evidence at r. 151, and being properly asked her name at the trial, she of course

properly said it was then (after that last marriage) Sallie E. Smith, and of course it was proper for her to state how she, who, when the policy was issued and also when the suit was commenced, was Sallie E. Hillmon, came to be Sallie E. Smith, all which evidence and statements were proper to inform the jury and the Court who she was. Her last marriage did not in any manner affect her status in the case. Sections 1, 2, 3 and 4 of Chapter 62 of the General Statutes of 1868 of Kansas, pages 562–3, are as follows:

"CHAPTER 62.

"MARRIED WOMEN.

"AN ACT respecting the rights of married women.

"*Be it enacted by the Legislature of the State of Kansas:*

"SECTION 1. The property, real and personal, which any woman in this state may own at the time of her marriage, and the rents, issues, profits or proceeds thereof, and any real, personal or mixed property which shall come to her by descent, devise or bequest, or the gift of any person except her husband, shall remain her sole and separate property, notwithstanding her marriage, and not be subject to the disposal of her husband, or liable for his debts.

"SEC. 2. A married woman, while the marriage relation subsists, may bargain, sell and convey her real and personal property, and enter into any contract with reference to the same in the same manner, to the same extent, and with like effect as a married man may in relation to his real and personal property.

"SEC. 3. A woman may, while married, sue and be sued, in the same manner as if she were unmarried.

"SEC. 4. Any married woman may carry on any trade or business, and perform any labor or services, on her sole and separate account; and the earnings of any married woman, from her trade, business, labor or services, shall be her sole and separate property, and may be used and invested by her in her own name."

And as James C. Smith is such husband as alluded to in said Sec. 1, it follows that she could continue to prosecute the action notwithstanding she had married him, and because of Sec. 140, at page 635, G. S. of Kansas 1868, which is as follows:

"SEC. 140. The Court, in every stage of action, must disregard any error or defect in the pleadings or proceedings which does not affect the substantial rights of the adverse party; and no judgment shall be reversed or affected by reason of such error or defect."

It is not material or important to consider whether her name should have been in the pleadings and record changed from Hillmon to Smith or not, but such question is not raised by that assignment of error, and further, the evidence referred to shows that there was proof of the marriage to Smith, and therefore, irrespective of any other reason, that instruction was properly refused.

And because of those statutes, defendant in error could continue to maintain her action notwithstanding her marriage to Smith after the action was commenced.

ASSIGNMENT OF ERROR No. 101. (R. 2004–5.)

Relating to a Refused Argumentative Instruction.

We contend that for reasons hereinbefore mentioned, plaintiff in error has not any available exception to the refusal of the Court to give the instruction No. 39 mentioned.

We submit that instruction No. 39 was erroneous in many respects and was designed as an argument and was properly refused, and we here refer to what we have before said in relation to assignment of error No. 85, and as we understand that instruction No. 39 it was desired as an argument among other things on the teeth question to help do away with the effect of the great discrepancy between the statement of

different witnesses plaintiff in error called to testify, some of whom described Hillmon's mouth as being exceedingly short for teeth, whilst others left him with a good enough mouth.

ASSIGNMENT OF ERROR No. 102. (R. 2005.)

Relating to a Refused Instruction.

We contend that for reasons hereinbefore mentioned, plaintiff in error has not any available exception to the refusal of the Court to give instruction No. 40 mentioned.

In this connection we refer to what we have hereinbefore said in relation to assignment of error No. 98 and instruction No. 25, as though here repeated, and we further submit that the only thing that saved the evidence from being sufficient to show *prima facie*, which would be enough for a civil case, that the only reason why the evidence did not show that plaintiff in error and its representatives attempted to compound a felony was the fact that the dead body was that of Hillmon, but we suppose it is not necessary to consider that question because the evidence tended that way; but even if it did not, there is nothing to show that anything was done in the case or that the case was in such shape as to require such instruction No. 40, or such instruction No. 25, as requested for any purpose other than to help whitewash plaintiff in error, Munn, Buchan, and others, and of course it would not have been proper for the Court to have distracted the attention of the jury from the issues in the case by trying to put white paint on plaintiff in error or its agents, and we submit the instruction was properly refused. It should be borne in mind in considering those two instructions Nos. 25 and 40 that the case on trial was not a criminal case, but a civil case, and that in such cases and in relation to such matters as referred to in those instructions, corporations are just as responsible to the opposite party for any wrong it may do through agents or otherwise as an individual is.

ASSIGNMENTS OF ERROR Nos. 107 and 108.

(R. 2006–7.)

We submit that plaintiff in error is not only without any available exception to the refusal of the Court to give either of those instructions, but that it is also without any available or reasonable excuse for making those assignments of error, or either thereof; the evidence was abundant to sustain the verdict as shown by the record, and of course it was proper to render judgment on the verdict.

And we submit that there is not any reversible error shown by the record, and we ask that the case be dismissed from this Court for want of jurisdiction in this Court, to review the record or determine whether the trial court erred or not, and if that is not done, then that the judgment of that Court and of the Court of Appeals in affirmance thereof, be affirmed by this Court, and that ten per cent. additional of the amount thereof be awarded her under rule 23.

And in support of the application for such ten per cent. damages for delay, and to prove that plaintiff in error has defended against the claim of defendant in error on which she recovered the judgment complained of for delay, we refer to the fact that there is not any competent evidence that either defendant in error or the insured (Hillmon) ever did an unlawful or improper act, or a lawful act in an unlawful or improper manner; whilst the record shows that plaintiff in error, by its assistants, representatives and agents, has from the time in 1879 when the dead body was on its way from Barbour County to Lawrence, to time of preparing papers for use in the Court for review of the judgment and proceedings by it complained of, done many wrongful acts, including among others,

1st. The effort by Wiseman, Griffith and Selig to entrap defendant in error into making a misdescription of her husband, and in same connection see the matter about height of Hillmon, including what is referred to in the stating part hereof and what is said in relation to assignments of error Nos. 79 and 86.

2nd. The cutting of a piece of flesh from the arm of the corpse, burning same with a hot iron by pretendedly learned medical gentlemen, and thus disfiguring the vaccine scar under the inexcusable pretence of seeing whether thereby effect could be produced equivalent to that scar, and carrying off the piece of flesh thus removed under pretence of preserving same for evidence at the trial, and practically throwing same away before the first trial of the case, and the treatment awarded defendant in error whilst engaged in the useless cutting, etc., of the corpse.

3rd. The sacrilege of pulling hair from the head of the corpse under pretence of wanting it for evidence at the trial, and not producing it at the trial.

4th. The pretended coroner's inquest at Lawrence, evidently for the private purposes of the insurance companies, and the treatment awarded defendant in error during that proceeding.

5th. The matter of the lost tintype on which Hillmon and Brown were shown side by side.

6th. The unsuccessful effort to scare Brown into fleeing, and then wrongfully seeking to create prejudice against him (a witness defendant in error needed) by claiming he fled, whereas on all appropriate occasions he was present and did not ever flee—done to injure defendant in error.

7th. The acts and threats which culminated in procuring from Brown the written statement, with intent to injure and wrong defendant in error and paying therefor.

8th. The motives and acts which culminated in the making of the "Munn paper" of 6th September, 1879.

9th. The swash-buckler style of threats of wrongful use of money, etc., and acts which culminated in procuring the release pleaded, and payment to Buchan for threatening both Brown and defendant in error, respectively, with a by plaintiff in error and its assistants misuse of money power on and as to judicial proceedings, including prevention of recovery on the policy sued on, and sending Brown to the penitentiary unless he would make the false written statement.

10th. The matter of the name of plaintiff in error on page 1926 of the record, all of which we contend, when considered with the other matters referred to herein, show beyond reasonable question that plaintiff in error, throughout the whole matter of the controversy and litigation, has sought to defraud defendant in error of a just claim against it, and has prosecuted its proceedings in error in hope of further and longer delaying defendant in error, without any cause or excuse whatever for hoping for more than delay, and therefore we submit she is entitled to such ten per cent. as provided for by rule 23 of this Court.

If the Court shall overrule our objections to the jurisdiction of this Court, and also to the hereinbefore mentioned 1798 pages of the so-called record, and also our argument as to the 110 several assignments of error, and determine to reverse the judgment of the trial Court, then we submit that the said 1798 pages is composed principally of matter which does not help or throw any light on and is not pertinent to any assignment of error which petitioner, plaintiff in error, had reasonable ground for hoping would be by any court of review considered stating cause for reversal, and that as shown by the exceptions set forth at pages 125 to 128 of the record, respondent did all she could to reduce the size and cause to be stricken out all unnecessary and improper parts of such bill of exceptions as was presented by petitioner, plaintiff in error, and objected thereto; that there ought not in any event to be taxed against her any more costs than such as would have necessarily been incurred to present such assignments of error, as in view of the case as tried it was reasonable to hope would be considered by a reviewing court as appropriate and proper to have made, considering the issues and the adopted part of said instructions Nos. 1 and 28. And in this connection we refer to subdivision 3 of rule 24 of this Court. And further, we submit that because of the first 2007 pages of the volume called the record, herein having come on file as it has, that there ought not in any event to be any cost taxed against respondent for or in relation to any matter of printing or preparing the same for printing, or indexing the same, in or for use of or in this

Court; and that because of the matters hereinbefore referred to in relation to said 1798 pages, part of that volume, there ought not in any event to be any costs taxed against her for any printing or for any copy or copies of said 1798 pages.

In this connection we request attention of the Court to the exhibit No. 1, filed herein by respondent on the 18th of November, 1901, which includes certain journal entries in case No. 3149, in which she recovered the judgment complained of, which exhibit is a duly certified transcript showing certain matters about impaneling and discharge of juries, setting aside of the judgment of 1888 in pursuance of the decision of this Court, shown in 145 U. S. 285, etc., which we refer to because of the rule of this Court about manifest error, etc., which transcript is mentioned at page 12 of her brief, filed herein in November, 1901, and was therein requested to be made part of the record herein, *really to prevent* any *adverse* ruling for want of a showing that such orders, etc., were made as shown by that transcript, dated 27th October, 1900.

Still we do not understand plaintiff in error claims that the judgment so as aforesaid rendered against it on the 18th of November, 1899, should be reversed because of anything occurring before or after the trial of 1899.

And as the case was, on the 13th of June, 1899, by consent of parties set for trial on 16th of October, 1899 (r. 67), we do not suppose any question will be made because of the matter of those omitted journal entries, etc., but if there should be, then said transcript of date October 27th, 1900, as so left with the clerk, shows such question should not be considered. Why those journal entries were omitted from the transcript sent with, and in answer to the writ of error, as returned to the Court of Appeals from the trial court, we do not comprehend, particularly as the said printed volume contains much that is not material to any assignment of error, and ought not to have been printed, and there is also involved the question that the cost of printing of immaterial matter ought to be taxed against plaintiff in error, whether the aforesaid judgment is reversed or not, to-wit:

1st. All between the copy of file marks on page 11 to the commencement of the last aforesaid answer, page 17.

2d. All between the copy of the filing of the said last reply on page 22 to end of page 64, except orders on pages 25 and 40, 41, 43, 44, 51 and 52, empaneling of juries in 1882, 1885, 1888, 1895 and 1896.

3d. All between the figures 142 on margin of page 84 and the figures 173 on page 107, about instructions.

4th. All between said figures 173 and the figures 185 on page 117, as the same is set forth at pages 1915 to 1925.

5th. And if the Court does not for other reasons tax all of the costs of procuring copy of and of printing the bill of exceptions, entitled, etc., in case No. 3147 (said 1798 pages), to plaintiff in error, then at least the costs of printing all thereof other than such, if any thereof, as this Court shall hold proper to have been printed with reference to assignments of error.

If the two cases mentioned in the aforesaid order of June 7, 1901 (r. 2012, 2013), had both been heard in the Court of Appeals, and were both here in substantially the same shape as this pending case, so far as applicable, the costs of procuring, printing, etc., of the before objected to 1798 pages of course could not any thereof be taxed in this now herein pending case, from which we contend it follows that not only our aforesaid objections thereto ought to be sustained, but even if they are overruled, that costs in relation thereto cannot properly be taxed herein, or in any court, against respondent.

As there would not have been time between the six days mentioned in the 1st subdivision and the three days mentioned in the 3d subdivision of rule 21 of this Court, to have prepared such brief for the respondent as, considering the matter of the petition for certiorari herein and the length of the record and number of assignments of error and the right of petitioner, if the jurisdiction shall be maintained herein, to argue in this Court, any question made by those assignments of error, we have prepared the foregoing without having had opportunity to see or know the contents of any such brief as plaintiff in error may file herein, and without knowing what specifications of error it will make or

rely upon, or which it intends to urge; and we have therefore made what we deem sufficient answer to each of the several 110 assignments of error made by the petitioner, with intention on our part of preparing and filing herewith an ADDENDA hereto after petitioner shall have filed its brief with such specifications of error, etc.

October 31, 1902.

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JOHN H. ATWOOD,
L. B. WHEAT,

Attorneys and Counsel for Respondent and Defendant in Error.

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